Supreme Court, U.S.
FILED

04167 6 JUN 13 2005

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER, *Petitioner*
v.
WILLIAM ALOYSIOUS THOMAS, III
ROBERT B. CAMPBELL, JR.
BALTIMORE GAS AND ELECTRIC COMPANY, *Respondents*

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence.

2. Whether or not Mercer's Complaint and pleadings justly warranted the application of the Code of Maryland, Courts and Judicial Proceeding §5-203 in any Maryland Court.

3. Whether or not Mercer's 7th and 14th U. S. Amendment rights to a preserved jury trial & due process were violated.

4. Whether or not the common law of contributory negligence can encourage and enable a Defendant by committing fraud to evade liability for Plaintiff's injuries and thereby deprive Plaintiff of a fair trial.

5. Whether or not the Trial Court's Judgment NOV was an irregularity subject to Maryland Rule 2-535(b) because the Trial Court ought to have recognized Campbell could steady the unextended ladder below the power line for a longer time without electrocution as long as the foreman or anyone else didn't extend the ladder up and into the power line which was the proximate cause of Campbell's injuries.

6. Whether or not Maryland's contributory negligence common law was used to violate Campbell's 7th U. S. Amendment right to preservation of a jury trial.

7. Whether or not any (including Maryland's) common law of contributory negligence is unconstitutional.

PARTIES TO THE PROCEEDING BELOW*

Petitioner, Plaintiff, Appellant is Gregory Shawn Mercer.

Respondent, Plaintiff, Appellant is Robert B. Campbell, Jr.

Respondent, Defendant, Appellees are William Aloysious Thomas, III, and Baltimore Gas and Electric Company, a body corporate.

* The parties come before this Court from prior and separate litigation originating as Mercer v. Thomas, Case No. CAL 03-02711, in the Circuit Court for Prince George's County, Maryland, and Campbell v. BG&E, Case No. 24-C-87-323051, in the Circuit Court for Baltimore City, Maryland. Both Plaintiffs lost their cases in the Circuit Courts and appealed to the Court of Special Appeals of Maryland (hereafter COSA).

Mercer lost in the COSA and filed a Petition for Writ of Certiorari to the COSA in the Court of Appeals of Maryland (hereafter COA) on October 27, 2004. Campbell used Maryland Rule 8-302(a) to appeal from the COSA directly to the COA without waiting for a COSA Opinion. Campbell filed his Petition for Writ of Certiorari to the COSA in the COA on December 2, 2004.

Both Mercer and Campbell expressed an interest in having their Petitions joined in the COA. The COA denied both these Petitions for Writ on the same day, December 23, 2004, giving the substantive grounds for each that "there has been no showing that review by certiorari is desirable and in the public interest." Subsequent Motions for Reconsideration were filed by both Mercer and Campbell on January 21, 2005 and were denied on the same day, March 14, 2005.

Petitioner, herein, seeks review of a COA Order where two Petitions were joined. As a consequence, Petitioner has named the joined parties from the COA as Respondents to this Petition in accordance with Supreme Court Rules 12.4 to 12.6.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gregory Shawn Mercer, Plaintiff in the Trial Court and Appellant in the Court of Special Appeals of Maryland, respectfully petitions for writ of certiorari to review the Order of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland in *Gregory Shawn Mercer v. William Aloysious Thomas, III*, (Petition Docket No. 434, September Term 2004, December 23, 2004) is reprinted in its entirety at *Appendix J* (App. 18) hereto. The Opinion of the Court of Special Appeals of Maryland in *Gregory Shawn Mercer v. William Aloysious Thomas, III*, (No. 1713, September Term 2003, July 28, 2004) is reprinted in its entirety at *Appendix H* (App. 11) hereto. The Judgment of the Circuit Court for Prince George's County, Maryland (CAL 03-02711, February 24, 2004*) is reprinted in its entirety at *Appendix E* (App. 8) hereto. The Opinion of the Circuit Court for Prince George's County, Maryland (CAL 03-02711, July 18, 2003), was transcribed and is reprinted in its entirety at *Appendix A* (App. 1) hereto. *Appendix A* (App. 1) is Hearing Part Two which sequentially follows *Appendix* EE (App. 90) which is Hearing Part One. Together, these two appendices form the July 18th, 2003 Hearing - "Transcript of Proceedings" in the Circuit Court for Prince George's

* - The Court of Special Appeals of Maryland remanded case for a written Judgment pursuant to Md. Rule 2-601(a) at *Appendix D.*

County, Maryland (CAL 03-02711, July 18, 2003).

JURISDICTION

Petitioner seeks this Court's review of the Order entered on December 23, 2004, by the Court of Appeals of Maryland. The Court of Appeals denied Petitioner's Motion for Reconsideration by Order at *Appendix K* (App. 19) entered on March 14, 2005. The Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

H14 - Amendment VII to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

H14 - Amendment XIV to the United States Constitution, section 1 provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

> United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

H15 - Constitution of Maryland, Declaration of Rights, Article 5(b) provides, in pertinent part:.

> The parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors.

H16 - Constitution of Maryland, Declaration of Rights, Article 19 provides:

> That every man, for any injury done him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

H17 - Constitution of Maryland, Declaration of Rights, Article 20 provides:

> That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People.

H18 - Constitution of Maryland, Declaration of Rights, Article 23 provides:

In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.

The right to trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $10,000, shall be inviolably preserved.

H19 - Constitution of Maryland, Declaration of Rights, Article 24 provides:

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land.

H20 - The Code of Maryland, Courts and Judicial Proceedings, §5-101 provides:

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

H21 - The Code of Maryland, Courts and Judicial Proceedings, §5-203 provides:

If the knowledge of a cause of action is kept from a

party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.

In accordance with Supreme Court Rule 33.1(d), this Petition contains verbatim text and may be 33 pages long.

STATEMENT OF CASES

Mercer v. Thomas (App. A - App. K):

The two-count "Complaint" for Case No. CAL03-02711 (App. X) was filed in the Circuit Court for Prince George's County, Maryland (hereafter "CC") on February 11, 2003 and alleged Respondent Thomas (hereafter "Respondent") committed Civil Perjury and Fraud. The "Joint Record Extract" filed in the Court of Special Appeals of Maryland (hereafter "COSA") on February 17, 2004 has page numbers beginning with "E" (e.g. - E41). These E-pages identify documents that were before both the COSA and the CC. The "Petition for Writ of Certiorari" to the COSA filed in the Court of Appeals of Maryland (hereafter "COA") on October 27, 2004 has facts presented in section "**H**." Each fact therein is numbered **H1** to **H28** herein. Fact **H1** (App. X) refers to two portions of the Complaint [E8 - E15], "Prayer for Relief" [E14 at App. 61] and "Election for Trial by Jury" [E15 at App. 62]. Therefore, the fact that Petitioner had exercised his rights via the 7th United States Constitutional Amendment and Article 5(b) of the Maryland

Constitutional Declaration of Rights was before all three lower courts: CC (due to "E15"), COSA (due to "E15"), and COA (due to "**H1**").

Additionally, Petitioner discussed his right to a fair jury trial in open court in CC (App. EE at App. 97 - App. 101, App.105), in his "Motion for Reconsideration" in COSA (App. I and **H14** in App. FF), and in his Petition for Writ of Certiorari in COA (**H14** - **H19** - See the Constitutional and Statutory Provisions Involved section above). *Appendix EE* has some errors in what the Court Reporter heard Petitioner say. Briefly, "last clear chance" was alternately heard as "last minute chance" and the cryptic "even in their voice" should read "certainly not" (App. 98).

The "Complaint Exhibit #4" [E28 - E53] contains Respondent's entire June 19th, 1997 deposition inclusive of a photographic exhibit and was filed attached to the Complaint (App. X) on February 11, 2003. Herein, the Complaint Exhibit #4 is extracted (App. AA) and contains **H3** referring to [E40 - E41], **H8** referring to [E33, E60 - E61], **H9** referring to [E48 - E50, E66 - E67], and **H10** referring to [E38 - E40, E62 - E63]. **H8** is evidence that Respondent only saw Petitioner's vehicle ahead "***sitting still***" waiting to make a left turn. **H9** is evidence that the reason Respondent didn't see Petitioner's evasive maneuver to get closer to the centerline and out of the path of two vehicles (a van and Respondent's vehicle) trying to pass Petitioner's vehicle on the right and from behind was because one of those vehicles, the van, interposed itself between Respondent's and Petitioner's vehicles. Thus, the van blocked Respondent's field of view while Petitioner was making his evasive maneuver. **H10** is evidence that

Respondent never regained sight of Petitioner's vehicle until the van's impact causing Petitioner massive injuries. Respondent became aware of the impact only because he "***heard it***" but did not see it.

The "Complaint Exhibit #5" [E54 - E77] (App. BB) contains an extract from the "Reporter's Official Transcript of Proceedings," Mercer v. Thomas, et al., Case No. CAL94-21066, in CC on January 15, 1998. Respondent's deposition testimony was presented in Court before the jury by Petitioner's attorney during Petitioner's case-in-chief at [E60 - E61] or **H8**, [E66 - E67] or **H9**, and [E62 - E63] or **H10**. Since Petitioner's attorney presented this Respondent deposition testimony during Petitioner's case-in-chief, Petitioner clearly *relied* on specific Respondent statements (**H8**, **H9**, and **H10** in App. BB) to prosecute his case. Later the same day, Respondent took the witness stand in his own defense but never corrected any misrepresentations he had made during his earlier deposition testimony.

Petitioner could not recover his prayer for relief in Mercer v. Thomas, et al., Case No. CAL94-21066, in CC on January 16, 1998, due to a jury verdict of negligence by Respondent but contributory negligence by Petitioner. On January 12th, 2001, Petitioner filed Mercer v. Von Diezelski, et al., Case No. CAL01-00801, in CC alleging his trial attorney failed to argue a last clear chance defense that would have permitted Petitioner to recover his prayer for relief in Mercer v. Thomas, et al. During discovery in Mercer v. Von Diezelski, et al., Respondent's insurance company, GEICO, was compelled to fax Petitioner Respondent's truthful, present-sense, written, signed,

insurance statement. This Respondent statement contains **H11** and was filed on February 11, 2003 in CC attached to the Complaint as "Complaint Exhibit #2" [E20] (App. Y).

H11 is evidence that Respondent saw Petitioner's vehicle "***virtually motionless***." The significance of the difference between "***sitting still* (H8)**" and "***virtually motionless* (H11)**" was analyzed in "Complaint Exhibit #3," Mercer Automobile Accident Analysis reprinted in its entirety (App. Z). The difference was further clarified on appeal in **H12** referring to [E33, E48 - E50, E73, E120 - E125, E141 - E147 E177 - E182] and **H13** in Petitioner's Motion for Reconsideration, COSA, August 24, 2004 (App. I & FF).

The obvious question arose, why didn't Petitioner's earlier accident reconstructionist figure this out (App. DD at paragraph 4)? The simple answer is that Respondent had the opportunity to see Petitioner's vehicle again after his line of sight was restored but not that he actually looked. Respondent gave deposition testimony under oath consistent with not having seen Petitioner's vehicle a second time after the visual obstruction, the van, was out of the way and before impact. The first accident reconstructionist could not say for certain that Respondent was not distracted by the radio, back seat, etc. at that critical moment. Only Respondent knows what he saw. In Petitioner's Response to Respondent's Motion to Dismiss the Complaint he argued this (App. DD at paragraph 4).

The fact that Respondent saw Petitioner's vehicle a second time prior to impact would be harmless error if Respondent didn't have a fresh opportunity to avoid the

collision and Petitioner's injury. Petitioner had to consult with an accident reconstructionist again to calculate the *last clear chance interval before filing a new Complaint* against Respondent. This point confused the Petitioner so that he wrote defective paragraph 19 of the Complaint (App. 60). In Respondent's Motion to Dismiss the Complaint, he pointed out the defect whereupon Petitioner acknowledged the defect and proffered a correction for it (App. DD at paragraphs 6 & 7). The Complaint was ***correctable*** prior to a Motions Hearing on July 18, 2003 (App. EE then App. A).

The CC judge ruled there is no "civil perjury." Petitioner concurred and on appeal Petitioner dropped the Civil Perjury count. The CC judge ruled, "... there's nothing pled regarding reliance on any statement made by the defendant to the detriment of the plaintiff." To the extent that Petitioner didn't quote the defendant only paraphrased him in "Complaint" paragraph 13, this would be true. However, paragraph 13 refers to attached Complaint Exhibit #5 and **H9** (Compare App. 58 with preamble to **H9** at App. 77). It would be a trivial task to copy language from Complaint Exhibit #5 into a paragraph 13 of an "Amended Complaint." This would not warrant a judgment granting the Respondent's motion to dismiss the complaint "with prejudice." Therefore, the independent state ground the judge used to dismiss the complaint with prejudice must have been the 3-year statute of limitations despite the Petitioner's pleadings that by fair readings of the Code of Maryland, Courts and Judicial Proceedings, §5-101 and §5-203, the latter should apply (App. DD at paragraph 6 & App. EE at App. 96 - App.97).

Of note is that the CC judge did not raise two grounds: 1) that the first accident reconstructionist could have determined the last clear chance argument five years earlier, or 2) that Petitioner had failed to do an adequate investigation based on proffered evidence (App. AA in **H3**, App. CC in **H4 - H7**, & App. EE at App. 95 - App. 99).

Petitioner filed a "Motion to Alter or Amend a Judgment - Court Decision" pleading specific fraudulent Respondent statements and **requesting leave to amend his Complaint**. The Motion was denied September 9, 2003. On appeal, Petitioner attached to his Brief of Appellant at pages 35 - 44 a copy of Davis v. DiPino et al., 337 Md. 642, 655 A.2d 401 (1995):

> Additionally, when a trial court grants a motion to dismiss for failure to state a claim upon which relief can be granted, the court has the discretionary authority to grant the plaintiff leave to amend the complaint to cure any defects. See Md. Rule 2-322(c).
>
> Furthermore, because the arguments on appeal of a motion for summary judgment focus solely on whether there are any disputes as to material facts, these arguments are not likely to address whether the complaint failed to plead a claim upon which relief can be granted. Thus, the plaintiff is not given the opportunity to argue that the pleading adequately alleges or could be amended to allege a legally sufficient cause of action and that dismissal is therefore inappropriate.

Thus, if the defendants had filed a motion to dismiss and if Davis was given an opportunity to amend his complaint, the facts alleged might be sufficient to establish that DiPino and Turner acted with malice. Additionally, even if the circuit court did not provide Davis with an opportunity to amend his complaint, at least Davis would have been able to argue on appeal that **precluding him from amending his complaint was an abuse of discretion and that the circuit court erred in granting the motion to dismiss**.

As a result of the Court of Special Appeals' *sua sponte* raising of the issue of the adequacy of the pleadings, Davis was precluded from either amending his complaint to plead a legally sufficient cause of action. The instant case demonstrates the prejudice that is suffered by a plaintiff when an appellate court affirms a trial court's judgment based on a motion to dismiss for failure to state a claim upon which relief can be granted when the motion on appeal is one for summary judgment.

Consistent with this Court's decisions, when an appellate court makes a determination that a trial court erred when it granted summary judgment because there was a genuine issue of material fact, the court should reverse and remand the case to the trial court for further proceedings. Because the plaintiff is prejudiced when an appellate court *sua sponte* raises and grants a motion to dismiss for failure to state a claim upon which relief can be granted, prohibiting an appellate

court from considering that issue is consistent with this Court's refusal to consider an issue for the first time on appeal if to do so would prejudice the plaintiff. In addition, because the Maryland rules do not authorize a motion for summary judgment to be converted into a motion to dismiss at the trial level, this conversion is certainly inappropriate at the appellate level. Thus, the Court of Special Appeals erred in affirming the circuit court's judgment in the instant case based on Davis's failure to plead any claim upon which relief can be granted, when the issue on appeal was whether the circuit court was correct in granting summary judgment for the defendants.

The COSP Opinion fails to mention that in Petitioner's Complaint "... there's nothing pled regarding reliance on any statement made by the defendant to the detriment of the plaintiff." What the COSA Opinion does opine is:

"[F]or more than three years before he filed this lawsuit, Mercer either knew, had reason to know, or had reason to investigate whether Thomas's deposition testimony and trial statements differed from his previous statement because he was lying .

Mercer alleges that he only "discovered [Thomas's] civil perjury and fraud on January 15, 2003, when Dr. Clyde C. Richard completed his report[.]" That mechanical engineering report was attached as an exhibit to Mercer's complaint. It addressed "the ability of Mr. Thomas to have seen the Mercer vehicle at a

sufficient time and distance to have altered the course of this accident."

Our review of Richard's report does not reveal any discernible connection between its findings and Mercer's alleged lack of knowledge regarding the veracity of Thomas's testimony. We see nothing in that document, for example, to indicate that Mercer failed to recognize that Thomas's testimony might be false. Nor do we see any explanation for why, once he heard Thomas's claims that his view was obstructed, Mercer failed to investigate the veracity of those statements by searching for any prior inconsistent statements that Thomas may have made (Opinion, pages 4-5).

Petitioner's Complaint alleges that Respondent's inconsistent insurance statement proved Respondent's deposition testimony heard by the CAL94-21066 jury was a ***willful misrepresentation*** which Petitioner ***relied on*** unaware of fraud contained therein and to his ***detriment***.

<u>Campbell v. BG&E</u> (App. L - App. W):

Maryland Rule 2-535(b) - **Revisory power**.
(b) *Fraud, mistake, irregularity*. On motion of any party filed **at any time**, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Campbell filed a Motion for Revisory Powers in the Circuit Court for Baltimore City (App. T) on August 24, 2004.

On April 7, 1986, William P. Sieglein owned SRSC and had 35 years experience with siding installation. The company had two employees at that time. Mark S. Jenkins was the SRSC foreman with 13 years experience working for SRSC and Robert B. Campbell, Jr. was supervised by this foreman. Jenkins was owner Sieglein's 32-year-old nephew and Campbell was 19-years-old at that time.

SRSC owner, as an employer, was required to notify BG&E whenever his employees would be working within ten feet of BG&E power lines (Maryland Annotated Code, Article 89, §§ 58-60).

Prior to April 7, 1986, the SRSC employer had examined 2 Bloomingdale Avenue and wrote an estimate for future work at the new work site without notifying BG&E that power lines, which were located in plain view, were 9 feet 10 inches from roof eaves on the house at that property. SRSC employees would be installing a form of siding called soffit under these eaves and fascia to the rake boards on the ends of these eaves (SRSC's Primary Negligence).

On April 7, 1986, both SRSC employees were reasonably expected to work within ten feet of BG&E's power lines located in plain view just outside or on the perimeter of this new work site yet the SRSC employer had not notified BG&E of these facts (More SRSC's Primary Negligence).

After arriving at 8:30 a.m. on April 7, 1986, the SRSC employer and the SRSC foreman walked around the job site discussing the work to be done while Campbell worked outside of hearing range setting up a work table. Campbell noticed power lines outside the fence around

perimeter of the new job site. The employer warned his foreman to watch for these power lines while working and then the employer left the job site to estimate future work at another job site (Primary Negligence situation of peril notice, Primary Negligence not concurrent with Contributory Negligence).

SRSC foreman supervised Campbell. At about 10:15 a.m., the foreman called Campbell over from the work table and directed Campbell to steady a 40-foot aluminum ladder just inside the fence around the perimeter of the job site and below BG&E power lines. The power lines were in plain view (Campbell did not assume the risk for his injury).

The SRSC employer was not at the work site at this time. The ladder was originally leaning against the house at the job site. The ladder was brought vertical and steadied with Campbell bracing himself against the fence. While Campbell steadied the ladder, the SRSC foreman pushed up on the ladder extension while looking upward toward the power lines located in plain view. The foreman pushed up on the extension with one of his feet on the ladder's lowest rung (Maryland Annotated Code, Article 89, §§ 58, 60-61 attached hereto - Campbell's Contributory Negligence, Contributory Negligence not concurrent with Primary Negligence, Last Clear Chance fresh opportunity of a considerable amount of time).

Campbell's Contributory Negligence was not causing any injury to this point as the ladder was being steadied by Campbell with the top of the ladder below all power lines. It was the next extension of the ladder by the SRSC foreman that would cause Campbell's injury (Campbell's

Contributory Negligence was not a cause of injury).

SRSC foreman pushed up on the ladder a third time while looking upward toward the line-to-ground, RMS, 7,600-volt power line located in plain view above with his feet on the second and third rungs of the ladder and until electrical contact was made between the power line and the top of the ladder. The SRSC foreman was not electrically grounded and jumped off the ladder while the Campbell suffered near fatal, severe, deforming injuries and burns throughout his body which have left him permanently disabled (Maryland Annotated Code, Article 89, §§ 58, 60-61 attached hereto - SRSC's Secondary Negligence, Secondary Negligence situation of peril notice).

In subsequent litigation but prior to trial, BG&E sued "William Sieglein t/a [trading as] Sieglein Roofing and Siding Company" and "Mark Jenkins".

The available Last Clear Chance defense that existed for the Campbell at the end of all evidence was:

a) SRSC employer was Primarily Negligent (Maryland Annotated Code, Article 89, §§ 58-60).

b) SRSC employer was aware of the Primary Negligence situation of peril and communicated a warning concerning this to the SRSC foreman.

c) Campbell was Contributorily Negligent (Maryland Annotated Code, Article 89, §§ 58, 60-61).

d) Campbell's Contributory Negligence by itself was not sufficient to cause his injuries.

e) Primary and Contributory Negligence were not concurrent so SRSC clearly made the original mistake.

f) SRSC foreman was Secondarily Negligent

(Maryland Annotated Code, Article 89, §§ 58, 60-61).

g) Secondary Negligence was new and independent of Primary Negligence.

h) SRSC foreman looked upward toward the line-to-ground, RMS, 7,600-volt power line which was located in plain view above while pushing up on the ladder extension and was aware of the Secondary Negligent situation of peril previously brought to his attention by the SRSC employer a couple hours earlier (Maryland Annotated Code, Article 89, §§ 58, 60, and 61).

i) The Last Clear Chance fresh opportunity was of a considerable amount of time as compared to 7.33 seconds in Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983) where a Last Clear Chance defense was used successfully.

Circuit Court instructed Jury twice. Once after it requested re-instruction while deliberating, Motion for Revisory Powers, page 4:

> 7. The jury received jury instructions, began deliberation, then requested to be re-instructed on Contributory Negligence:
>
> A Plaintiff cannot recover if his negligence is a cause of his injury. ... To ... be barred, the negligence must be a cause of an injury.
>
> A Plaintiff cannot recover if his negligence is a cause of his injury.

After Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983), any Maryland Jury was empowered to deliberate with the Last Clear Chance theory. The actual Jury Verdict Sheet in Robert B. Campbell v. Baltimore Gas and Electric Company, Case No. 87323051 / CL73959, December 13, 1991 with the Jury findings (App. L & M) was:

1. Was BG&E negligent? Yes X No ____
2. Was Robert Campbell contributorily negligent? Yes ____ No X
3. Did Robert Campbell assume the risk of his injury? Yes ____ No X
4. Was Mark Jenkins negligent? Yes ____ No X
5. Was William Sieglein negligent? Yes X No ____
6. In what amount do you award damages? $ 4,850,000

This Jury Verdict was a Last Clear Chance Jury Verdict:

William Sieglein was most associated with SRSC in the trial due to BG&E suing "William P. Sieglein trading as Sieglein Roofing and Siding Company". Sieglein's Motion Inlimini to prevent BG&E from referring to Sieglein the individual as the person responsible for notifying BG&E of the proximity of power lines to SRSC employees had been denied. SRSC foreman Mark Jenkins was not negligent, the company he worked for was negligent. Robert Campbell's

Contributory Negligence was not a cause of his injury, SRSC foreman's pushing up to extend the ladder was the proximate cause of Campbell's injury in accordance with the Jury Instructions given two times. Robert Campbell had been directed by his supervising foreman to hold the ladder steady. Additionally, the Jury found BG&E to be negligent. Therefore, Campbell could have and should have recovered the Jury award from SRSC and BG&E jointly and severally.

The Jury Verdict Sheet ambiguous Question No. 2:

Was Robert Campbell contributory negligent?

Yes ___ No ___

To avoid ambiguity, the Jury Verdict Sheet Question No. 2 should have been:

Was Robert Campbell contributory negligent and, if so, was his contributory negligence a cause of his injuries?

Yes ____ No ____

At trial, there was prospective juror #3 who was a personal injury attorney, Pauline Olsen. Motion for Revisory Powers, pages 5-6:

14. Prospective Juror No. 3, attorney Pauline Olsen (spelled phonetically "Olson" in Transcript) [12/4/91 Trial Transcript pages 8, 43, 58, 63 - 64], was at the top of the juror list after Voir Dire but before the four trial counsel exercised their strikes (4 each). This prospective juror knew of Last Clear Chance theory. The Trial Judge informed counsel the jurors were to be seated starting from the top of the juror list [page 63].

Petitioner's Request for Jury Instructions included a

Comparative Negligence Instruction, Request No. 16. The Circuit Court denied this instruction and Petitioner noted his exception:

If you find that plaintiff was negligent, and that his negligence contributed to his injuries, then you must determine the relative contributions (on a percentage basis) of the defendant BG&E's negligence and the plaintiff's negligence to those injuries and damages. Your assessment of the dollar value of the plaintiff's damages will then be reduced by the Court by the percentage which you attribute to the plaintiff's negligence.

REASON FOR GRANTING THE WRIT

First and foremost, does the Supreme Court have jurisdiction. Is there an independent and adequate state ground to keep the Supreme Court out of these matters involving 7th Amendment rights to preserved jury trials. Certainly, Maryland Declaration of Rights Articles 5(b), 20, and 23 encourage the grant of the preserved jury trial.

The only independent and adequate state ground for Petitioner's case would be Courts and Judicial Proceedings, §5-101 (hereafter Courts §5-101) if case law supports it. A fair reading of Courts §5-101 alerts immediately that, "unless another provision of the Code provides a different period of time within which an action shall be commenced," Courts §5-101 will apply. Courts §5-203 is this other section.

In Piper et ux. v. Jenkins et ux., 207 Md. 308, 113 A.2d 919 (1955), where a homeowner could have gotten a plat map of his property and discovered that the sellers

had misrepresented that improvements were within the property line before the statute of limitations expired. The question about what diligent efforts were used by the buyer were rightfully raised. Also of interest in this case is that leave was extended to homeowner in order for him to amend the Complaint. That Plaintiff got the chance to amend his Complaint.

In Mette v. Boone, 251 Md. 332, 247 A.2d 390 (1968), the homeowner had watched the "L" copper pipe installation without comment and the basement pipes remained exposed during more than seven years before filing the suit. Certainly, a diligent homeowner who watches the house being built is charged with some oversight responsibility. If he didn't learn of his cause of action, he could have with research.

Accordingly, Petitioner's claim to Courts §5-203 is supported by this case law. Where does this Petitioner find a file of what Respondent's eyes saw? There is no way to get this information unless Respondent makes an inconsistent statement given or spoken to someone. Petitioner checked for courtroom testimony, police interviews, asked Respondent if he had spoken to anyone about the accident or given any statements to anyone. The only thing Respondent said was that he "assumed" he gave his insurance company a statement but that he didn't remember. Petitioner has to catch Respondent in a lie as he steadfastly denies seeing Petitioner's vehicle a second time.

The Petitioner must have used ordinary diligence to get the statement which he did. The insurance statement was privileged and ordinary diligence can not suggest breaking

and entering to obtain it is ordinary. Respondent has to have concealed the statement with fraud which Petitioner alleged in his Complaint. According to Furguson v. Cramer, 116 Md. App. 99, 103; 695 A.2d 603, 605 (1997):

> Since the appeal itself arises from a motion to dismiss, "we assume the truth of all relevant and material well-pled facts, as well as all the inferences that could reasonably be drawn from those facts, in the light most favorable to appellant.

Where the CC judge ruled on adequacy of the Complaint on an issue that was clearly and easily correctable, the COSA has failed to mention the issue again. Instead, the COSA has gone beyond the review of the CC judgment and without invoking Maryland Rule 8-131(a) has given different grounds to justify the Dismissal of the Complaint in a trial de novo fashion.

By Davis v. DiPino et al., 337 Md. 642, 655 A.2d 401 (1995), for reasons given in the previous Statement of the Cases section (pages 10 - 12) and attached to Petitioner's Brief of Appellant in the COSA, Petitioner argues that the CC abused its discretion and erred by not granting Petitioner's motion for leave to amend the complaint. This motion was within the Motion to Alter or Amend a Judgment - Court Decision. Further, the COSA abused its discretion and erred by not reversing the CC unfounded ground of "nothing pled regarding reliance on any statement made by defendant." Paragraph 13 of Complint did not warrant dismissal with prejudice. Moreover, by finding new, different, and unfounded grounds to uphold

the Dismissal of the Complaint goes contrary to case law, Davis v. DiPino et al.

Petitioner pled a ordinary diligent investigation to the trial court (App. AA in **H3**, App. CC in **H4 - H7**, & App. EE at App. 95 - App. 99) both in and out of court. The CC judge was convinced. Petitioner argued that his first accident reconstructionist could not be faulted for not determining that Thomas looked when he had the opportunity to see Petitioner (App. DD in paragraph 4 and App. FF in **H13**). The CC judge was convinced. Why is that investigation suddenly now inadequate and the first accident reconstructionist's wisdom so flawed? Did the COSA give me a de novo trial *sua sponte* in my absence. These issues were resolved at the CC level. The COA rebuff is not new as can be seen by comparing App. J with App. Q and V.

In Weyler v. Gibson, 110 Md. 636, 73 A. 261 (1909), the COA equate Declaration of Rights Articles 19 and 23 to United States Amendment 14. By Chapter 681 of Acts of 1977 ratified by the Maryland General Assembly on November 7, 1978, Declaration of Rights Article 23 became Article 24 and Maryland Constitutional Article XV, sections 5 and 6, combined to become the new Article 23. Therefore, Maryland Declaration of Rights 19 and 24 are equivalent to the 14th United States Amendment.

Petitioner invokes his 14th Amendment rights to due process and equal protection of the law to move this Court to reverse the COSA Opinion. The facts establish that Petitioner did an adequate investigation for the privileged Respondent insurance statement. Further, the first accident reconstructionist can not be faulted for missing a

last clear chance analysis. There was no last clear chance defense without the inconsistent insurance statement.

Maryland is evading federal issues and attempting to quash Petitioners Complaint. Maryland courts have failed to give Petitioner "a reasonable opportunity to have the issue as to the claimed right heard and determined by [its] courts." Central Union Telephone Co. v. City of Edwardsville, 269 U. S. 190, 46 S. Ct. 90, 70 L. Ed. 229 (1925). Due to discriminatory application of state court rules, the federal question of a right to due process and a jury trial has been evaded. Hartford Life Ins. Co. v. Johnson, 249 U. S. 490, 39 S. Ct. 336, 63 L. Ed. 722 (1919) and Wolfe v. North Carolina, 364 U. S. 177, 80 S. Ct. 1482, 4 L. Ed.2d 1650 (1960).

Perhaps the COA is attempting to discourage me from filing this Petition to the Supreme Court of the United States. In Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983), a successful last clear chance with a fresh opportunity of 7.33 seconds was upheld in the COSA. Petitioner has a viable last clear chance of 7.4seconds or longer (App. Z).

The COA is determined to keep contributory negligence even if it means walking on Petitioner's federal rights via the COSA. Look at Complaint paragraph 13 (App. X). The fraudulent statement is attached to the complaint in Exhibit #5 which is a repetition of Exhibit #4. Is there any question of what the specific fraudulent Respondent statement is or where to read it verbatim? Is there any reason why Petitioner should not be extended leave to amend this correctable Complaint?

The best hope of an independent and adequate state

ground is Maryland's insistence that Courts §5-101 applies over §5-203. This is an independent state ground, but it is inadequate. Courts §5-101 points to other sections and, for this case, Courts §5-203 is the more applicable statute.

Respondent wrote the insurance statement to "whomever it may concern" and prefaced his signature with a affiant's statement. Suddenly during deposition he can not remember it or if he gave it to his insurance company. He only "assumed" he gave his insurance company a statement. Ordinary diligence can not overcome this unhelpfulness.

In Granholm, Governor of Michigan, et al. v. Heald, et al., No. 03-1116, Michigan Beer & Wine Wholesalers Association v. Heald, et al., No. 03-1120, Swedenburg, et al. v. Kelly, Chairman, New York Division of Alcoholic Beverage Control, State Liquor Authority, et al., No. 03-1274, Joint Appeals all decided May 16, 2005, 544 U. S. ____ (2005), this Court had jurisdiction over a state right that violated the Commerce Clause, Art. I, §8, cl. 3. That state right was the 21st Amendment. This case at bar offers just such a circumstance by allowing the Supreme Court to have jurisdiction over contributory negligence common laws in Maryland and possibly Alabama, North Carolina, Virginia, and the District of Columbia.

In Simler v. Connor, 372 U. S. 221, 83 S. Ct. 609, 9 L. Ed.2d 691 (1963), this Court ruled unanimously that the jury trial once preserved is a right in matters with a legal character involving common-law issues. In Curtis v. Loether et al., 415 U. S. 189, 94 S. Ct. 1005, 39 L. Ed.2d

260 (1974), this Court ruled unanimously that the jury trial once preserved is a right. The question of whether the Civil Rights Act or the 7th Amendment controlled the case was resolved in favor of the 7th Amendment unanimously. Petitioner preserved his 7th Amendment right to a jury trial with the Election for Trial by Jury (App. X in H1).

In Respondent Campbell's appeal, he alleges an irregularity was made by the Circuit Court for Baltimore City that stripped his $4.85 million jury award using the common law of contributory negligence as an excuse. No clearer way to show that contributory negligence is a vestige of the past and is unconstitutional. When the Trial Court made the Judgment NOV, it was required to determine if there is any way the jury verdict was reachable. They missed what this Petition and Respondent Campbell's COA Petition have discovered. The jury verdict was possible and even reasonable. An "irregularity," as used in Rule 2-535(b), means "the doing or not doing of that ,in the conduct of a suit , which, conformable to the practice of the court, ought or ought not to be done." Early v. Early, 338 Md. 639, 659 A.2d 1334 (1995). In Weitz v MacKenzie et ux., 273 Md. 628, 331 A.2d 291 (1975):

> "An irregularity which will permit a court to exercise revisory powers over an enrolled judgment has been consistently defined as the doing or not doing of that, in the conduct of a suit at law, which, conformable to the practice of the court, ought or ought not to be done. As a consequence, irregularity, in the contemplation of Md. Rule 625(a), usually means irregularity of process

> or procedure, and not an error, which in legal parlance, generally connotes a departure from truth or accuracy of which a defendant had notice and could have challenged. Additionally, the party who seeks to invoke the court's revisory power must show by satisfactory proof that he is acting in good faith, with ordinary diligence, and that he has a meritorious defense."

Irwin v. Spriggs, 6 Gill 200 (1847) adopted contributory negligence in Maryland. That was 158 years ago. Meanwhile, 46 states have converted from contributory negligence to some form of comparative negligence. The complete history of this conversion for these 46 states inclusive of the session law (statutory law)or highest state court case (common law) which caused the conversion are given in *Appendix HH*. The bold entries are corrections to this same list in Petitioner's Brief of Appellant filed in COSA. Maryland shares contributory negligence with three other states and the District of Columbia: Alabama, North Carolina, and Virginia.

In Harrison et al. v. Montgomery County Board of Education et al., 295 Md. 442, 456 A.2d 894 (1983), the COA ruled it was for the legislature to change to comparative negligence. *Appendix GG* details 39 years of attempt, on and off, of the Maryland General Assembly to convert to comparative negligence. The closest that the Maryland General Assembly ever came to the actual conversion was SB21 in 1985 which made it to the Senate floor of the Maryland Senate and passed. The bill made it out of the Maryland House of Delegates to the House floor

and died in a 3rd reading with a vote of 53 yeas, 22 no votes, and 66 nays. SB21 was a 49% comparative negligence bill which would have allowed a victim to sue if his contribution was less than that of the defendant(s).

West Virginia has a 49% comparative negligence common law which was decided in an electrocution case nearly identical to the circumstances in Respondent Campbell's appeal. Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S. E.2d 879 (1979). The similarities between these cases are detailed in Respondent Campbell's COA Motion for Reconsideration filed January 21, 2005.

Maryland is making great strides to keep contributory negligence while its citizens suffer.

CONCLUSION

For the reasons stated herein, Petitioner prays this Court to grant his petition for certiorari.

Respectfully submitted,

Gregory Shawn Mercer
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Counsel of Record
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Oakton, Virginia 22124
(703) - 591-4662

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APPENDIX A

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAL 03-02711

GREGORY SHAWN MERCER, Plaintiff vs.

WILLIAM ALOYSIOUS THOMAS, III, Defendant

TRANSCRIPT OF PROCEEDINGS
(Hearing - Part 2)

Friday, July 18, 2003
Upper Marlboro, Maryland

BEFORE: The [sic. Honorable] WILLIAM B. SPELLBRING, JR., Associate Judge

APPEARANCES:
For the Plaintiff: PRO SE
For the defendant: WADE J. GALLAGHER, ESQ.

Excerpt from transcript page 20 [Court of Special Appeals of Maryland Joint Record Extract - T20, E202]:

Continuation from App. EE (Hearing - Part1)

THE COURT: Grant defendant's motion to dismiss the complaint for the following reasons; perjury, there is not

civil cause of action for perjury; that's a crime which has criminal sanctions; count 2, fraud, there's nothing pled regarding reliance on any statement made by the defendant to the detriment of the plaintiff. Also find that the matter is filed beyond the 3 year period of limitations and for those reasons I'll grant the defendant's motion to dismiss counts 1 and 2 of the complaint. Thank you, gentlemen.

WADE GALLAGHER: Your Honor, may that be without leave to amend?

THE COURT: It's with prejudice.

OTHER ATTORNEY [sic. WADE GALLAGHER]: Thank you, Your Honor.

THE COURT: Next stop, Annapolis.

MR. MERCER: Can I appeal?

THE COURT: You can appeal to Annapolis, yes, sir. And I'm sure you will.

(Proceedings concluded.)

REPORTER'S CERTIFICATE [T22, E204]:

[Text omitted]

s/ Barbara C. Chappell
Official Court Reporter

APPENDIX B

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAL 03-02711

GREGORY SHAWN MERCER, Plaintiff v.

WILLIAM ALOYSIOUS THOMAS, III, Defendant

ORDER

This motion is before the Court on the plaintiff's Motion for Leave to Amend Other Court Papers.

UPON CONSIDERATION of the Motion, the opposition thereto and the record herein, it is this 9th day of September, 2003

ORDERED, that Plaintiff's Motion for Leave to Amend Other Court Papers be, and the same hereby is, GRANTED only to the amended corrections filed by the Court Reporter.

s/ William B. Spellbring, Jr.
JUDGE - Circuit Court for Prince George's County Maryland

APPENDIX C

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAL 03-02711

GREGORY SHAWN MERCER, Plaintiff v.

WILLIAM ALOYSIOUS THOMAS, III, Defendant

ORDER

This matter is before the Court on the plaintiff's Motion to Alter or Amend the Order of July 18, 2003 granting defendant's Motion to Dismiss the Complaint and the plaintiff's alternative Motion for a New Hearing.

UPON CONSIDERATION of the plaintiff's Motion, the opposition thereto and the record herein, it is this 9th day of September, 2003,

ORDERED, that plaintiff's Motion to Alter or Amend the decision of July 18, 2003 be, and the same hereby is, DENIED, and it is further

ORDERED, that plaintiff's Motion for a New Hearing be, and the same hereby is, DENIED.

s/ William B. Spellbring, Jr.
JUDGE - Circuit Court for Prince George's County Maryland

APPENDIX D

IN THE COURT OF SPECIAL APPEALS
[OF MARYLAND]

No. 1713, September Term 2003

GREGORY SHAWN MERCER, [Appellant] v.

WILLIAM ALOYSIOUS THOMAS, III, [Appellee]

ORDER (2/18/2004)

A review of the record in the above-captioned appeal indicates that on July 18, 2003, a hearing was held in the Circuit Court for Prince George's County before the Honorable William B. Spellbring, Jr., in connection with Appellee's Motion to Dismiss the Complaint. At the conclusion of the hearing, the court granted the Motion in open court and dismissed Appellant's Complaint with prejudice. Although the court's ruling was placed on the record during the July 18, 2003 hearing and was entered on the docket the same day, there is no *separate* document indicating the lower court's judgment in the matter.

Maryland Rule 2-601(a) states, in relevant part, that:

> Each judgment shall be set forth on a *separate document*. Upon a verdict of a jury or a decision by the court allowing recovery only of costs or a specified amount of money or denying all relief, the clerk shall forthwith prepare, sign, and enter the

> judgment, unless the court orders otherwise. Upon a verdict of a jury or a decision by the court granting other relief, the court shall promptly review the form of the judgment presented and, if approved, sign it, and the clerk shall forthwith enter the judgment as approved and signed. A judgment is effective only when so set forth and when entered as provided in section (b) of this Rule.

(Emphasis added). *See also* Mukhtar Taha v. Southern Management Corp., 367 Md. 564 (2002). "Judgment" is defined as "any order of the court final in its nature entered pursuant to these rules." (Md. Rule 1-202(n)).

The record contains no judgment set forth on a separate document as required by Maryland Rule 2-601(a). Therefore, it is this 18th day of February, 2004, by the Court of Special Appeals, on its own initiative,

ORDERED that this case be, and the same is hereby, REMANDED, without affirmance or reversal, to the Circuit Court for Prince George's County for the entry and docketing of a judgment strictly conforming to the requirements of Maryland Rule 2-601(a); and it is further

ORDERED that, pursuant to Maryland Rule 8-602(d), the notice of appeal filed on October 9, 2003, shall be treated as filed on the same day as, but after, the entry of judgment on the docket; and it is further

ORDERED that, as soon as is practicable, the Clerk of the Circuit Court shall certify to the Clerk of this Court that the required action has been taken and shall supplement the record on appeal with the judgment, corrected docket entries, and Index; and it is further

ORDERED that the record on appeal shall remain in this Court; and it is further

ORDERED that the briefing and argument schedule in this Court shall not be affected by this Order.

s/ Joseph F. Murphy,Jr.
CHIEF JUDGE

APPENDIX E

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAL 03-02711

GREGORY SHAWN MERCER, Plaintiff v.

WILLIAM ALOYSIOUS THOMAS, III, Defendant

JUDGMENT

This matter having been decided by:

[X] A Judge;

with Judge Spelling [sic. Spellbring] presiding, it is this 24th day of February, 2004

ORDERED AND ADJUDGED that:

[X] the complaint is dismissed without leave to amend.

s/ Rosalyn E. Pugh
CLERK OF THE COURT

APPENDIX F

IN THE COURT OF SPECIAL APPEALS
[OF MARYLAND]

No. 1713, September Term 2003

GREGORY SHAWN MERCER, [Appellant] v.

WILLIAM ALOYSIOUS THOMAS, III, [Appellee]

ORDER

This Court having considered Appellant's Motion for Leave of Court for Amici to File Amicus Curiae Briefs, the Opposition of Defendant/Appellee to Motion fo Leave of Court for Amici to File Amicus Curiae Briefs, and Appellant's Reply to Opposition of Appellee to Motion for Leave of Court for Amici to File Amicus Curiae Briefs / Second Motion for Ex Parte Order, it is this 10th day of March, 2004, by the Court of Special Appeals,

ORDERED that, because Appellant states that the purpose of the amicus briefs would be to have this Court "critically review the fairness and justness of Maryland's contributory negligence common law," and because it is for the Court of Appeals of Maryland or the General Assembly to change the law as to contributory negligence, the Motion for Leave of Court for Amici to File Amicus Curiae Briefs is denied.

s/ Joseph F. Murphy, Jr.
CHIEF JUDGE

APPENDIX G

IN THE COURT OF SPECIAL APPEALS
[OF MARYLAND]

No. 1713, September Term 2003

GREGORY SHAWN MERCER, [Appellant] v.

WILLIAM ALOYSIOUS THOMAS, III, [Appellee]

ORDER

This Court has read and considered Appellant's Maryland Rule 8-414 Motion (Correction of Record) and Motion for Costs. It is therefore this 20th day of July, 2004, by the Court of Special Appeals,

ORDERED that the relief requested in Appellant's Motions be, and are hereby, denied.

s/ Joseph F. Murphy,Jr.
CHIEF JUDGE

APPENDIX H

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1713, September Term 2003
(CAL0302711)

GREGORY SHAWN MERCER, [Appellant] v.

WILLIAM ALOYSIOUS THOMAS, III, [Appellee]

Davis,
Eyler, James R.,
Adkins,
JJ.

OPINION by Adkins, J.

FILED: July 28, 2004

Appellant Gregory Shawn Mercer asks us to revive his perjury and fraud claims against appellee William Aloysious Thomas, III, arguing that the Circuit Court for Prince George's County erred in dismissing those claims with prejudice. We find no error and affirm the judgment.

FACTS AND LEGAL PROCEEDINGS

Mercer and Thomas were involved in a motor vehicle accident in November 1992. Mercer's suit against

Thomas went to trial. Mercer was found contributorily negligent, resulting in a defense verdict.

After pursuing an unsuccessful malpractice suit against his attorney, Mercer filed this action against Thomas. According to Mercer, during the accident litigation, Thomas made fraudulent and perjurious statements that contradicted a statement he made to his insurance carrier shortly after the accident. The subject of the disputed statement was whether Thomas's view of Mercer's vehicle just before the collision was obstructed by a third vehicle.

Thomas moved, inter alia, to dismiss Mercer's complaint, asserting that it was barred by the three year statute of limitations and that it failed to allege essential elements of these causes of action. After a hearing, the circuit court granted the motion and dismissed Mercer's claims with prejudice. Mercer filed this timely appeal.

DISCUSSION

Notwithstanding Mercer's prodigious efforts to challenge what he views as the arcane doctrine of contributory negligence, our resolution of this appeal rests entirely on the distinct and simple concept of limitations[1].

> [1]Statutes of limitation were enacted in an effort to balance the competing interests of potential plaintiffs, potential defendants, and the public. The statutory period provided by a statute of limitations represents a compromise of these interests and "reflects a policy decision regarding what constitutes an adequate period of time for a person

> of ordinary diligence to pursue his claim." By creating a limitations period, the legislature determined that a plaintiff should have only so long to bring his action before he is deemed to have waived his right to sue and to have acquiesced in the defendant's wrongdoing. Limitations statutes therefore are designed to (1) provide adequate time for diligent plaintiffs to file suit, (2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and (3) serve society by promoting judicial economy. *Pennwalt Corp. v. Nasios*, 314 Md. 433, 437-38 (1988).

The circuit court held that Mercer's claims were barred by the applicable three year limitations period in Md. Code (1974, 2002 Repl. Vol.), section 5-101 of the Courts & Judicial Proceedings Article (CJ). For the reasons set forth below, we agree with that holding and therefore affirm the judgment without addressing Mercer's other assignments of error.

The accident from which all this litigation stems occurred in November 1992. The deposition and trial testimony during which the alleged perjury and fraud occurred took place on June 19, 1997 and January 15, 1998, respectively. This civil lawsuit was filed on February 11, 2003.

That is more than five years after the last incident of alleged perjury and fraud during the accident litigation. Thus, Mercer filed suit two years after the three year limitations period expired. The circuit court correctly applied CJ section 5-101 to these undisputed facts. Dismissal with

prejudice was appropriate because no amendment could have cured this fatal flaw.

We are not persuaded otherwise by Mercer's attempts to "plead around" the limitations period via the "discovery rule." "Under Maryland's 'discovery rule,' the three-year statute of limitations period begins to toll when the 'plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury.'" *Ver Brycke v. Ver Brycke*, 379 Md. 669, 699 (2004). When, as in this case, there is no dispute regarding the facts regarding the plaintiff's discovery of his or her cause of action, the issue of "[w]hen a cause of action accrues is usually a legal question for the court." *Moreland v. Aetna Health-care, Inc.*, 152 Md. App. 288, 296 (2003).

In determining the date on which the limitations period begins to accrue in a particular case, "'[i]t is the discovery of the injury, and not the discovery of all of the elements of a cause of action that starts the running of the clock for limitations purposes.'" *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 450 (2000) (citation omitted). Once a "potential plaintiff is on 'inquiry notice' of such facts and circumstances that would 'prompt a reasonable person to inquire further[,]'" he is also "charged with responsibility for investigating , within the limitations period, all potential claims and all potential defendants with regard to the injury." *Doe v. Archdiocese of Washington*, 114 Md. App. 169, 188-89 (1997) (citation omitted).

> "The discovery rule applies to knowledge of facts, not knowledge of law. Knowledge of law is

> presumed. Ignorance of the rights [the law] grants and protects does not toll the statute of limitations. If plaintiffs remain unaware of their legal rights after notice of injury, the statute of limitations sets an absolute deadline for gaining awareness. A plaintiff must exercise reasonable diligence – defined by the limitations period – "in determining whether ... particular acts or omissions causing injury are actionable in court."

Moreland, 152 Md. App. at 298 (quoting *Capital Dist. Physician's Health Plan v. O'Higgins*, 939 F. Supp. 992, 1000 (N. D. N. Y. 1996)).

Applying these established principles of law to Mercer's claims, we have no trouble concluding that they are time-barred. Mercer's own complaint reveals that he had sufficient facts to put him on actual, constructive, and/or inquiry notice of his claims against Thomas. In other words, for more than three years before he filed this lawsuit, Mercer either knew, had reason to know, or had reason to investigate whether Thomas's deposition and trial statements differed from his previous statement because he was lying.

Mercer alleges that he only "discovered [Thomas's] civil perjury and fraud on January 15, 2003, when Dr. Clyde C. Richard completed his report[.]" That mechanical engineering report was attached as an exhibit to Mercer's complaint. It addressed "the ability of Mr. Thomas to have seen the Mercer vehicle at a sufficient time and distance to have altered the course of this accident."

Our review of Richard's report does not reveal any

discernible connection between its findings and Mercer's alleged lack of knowledge regarding the veracity of Thomas's testimony. We see nothing in that document, for example, to indicate that Mercer failed to recognize that Thomas's testimony might be false. Nor do we see any explanation for why, once he heard Thomas's claims that his view was obstructed , Mercer failed to investigate the veracity of those statements by searching for any prior inconsistent statements that Thomas may have made.

"The commencement of the statute of limitations is not delayed until the conclusion of [a party's] diligent investigation." *Lumsden*, 358Md. at 448. Accordingly, the Richard report does not justify Mercer's invocation of the discovery rule.

We finish with a final word regarding Mercer's continuing efforts to litigate what caused the accident, under the umbrella of the many subsequent motions and lawsuits he has filed. The trial that took place in 1998 finally resolved that question for all legal purposes. No court can revisit the factual determinations made during that trial - including the finding that Mercer was contributorily negligent - by considering new evidence or by re-weighing the old evidence and the credibility of witnesses who testified at the trial. More litigation challenges to these factual findings will predictably result in more judgments affirming the results of the accident litigation. To the extent Mercer's experience inspires him to seek changes in the law, he may pursue them legislatively.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX I

IN THE COURT OF SPECIAL APPEALS
[OF MARYLAND]

No. 1713, September Term 2003

GREGORY SHAWN MERCER, [Appellant] v.

WILLIAM ALOYSIOUS THOMAS, III, [Appellee]

ORDER

Upon consideration of Appellant's Motion for Reconsideration of the Court's unreported opinion filed July 28, 2004 in the captioned appeal, it is this 12th day of October, 2004, by the Court of Special Appeals,

ORDERED that the Motion is denied.

For a panel of the Court

s/ Joseph F. Murphy,Jr.
CHIEF JUDGE

[The Court of Special Appeals of Maryland Mandate was also issued October 12, 2004 and Petitioner filed Petition for Writ of Certiorari in the Court of Appeals of Maryland on October 27, 2004.]

APPENDIX J

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 434, September Term 2004
(No. 1713, September Term 2003,
Court of Special Appeals)

GREGORY SHAWN MERCER, [Petitioner] v.

WILLIAM ALOYSIOUS THOMAS, III, [Respondent]

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the supplements and the answers filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplements be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert M. Bell
CHIEF JUDGE

DATE: December 23, 2004

APPENDIX K

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 434, September Term 2004
(No. 1713, September Term 2003,
Court of Special Appeals)

GREGORY SHAWN MERCER, [Petitioner] v.

WILLIAM ALOYSIOUS THOMAS, III, [Respondent]

ORDER

The Court having considered the motion for reconsideration filed, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

s/ Robert M. Bell
CHIEF JUDGE

DATE: March 14, 2005*

[* - This is the date the Petition for Rehearing was denied from which Petitioner has 90 days or until Sunday, June 12, 2005 to file a Petition for Writ of Certiorari in the Supreme Court of the United States of America. Due to the 90th day being Sunday, the deadline for this Petition to be filed in this Court is June 13, 2005.]

APPENDIX L

[Campbell COA Petition paragraph **H13**]:

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No. 87323051 / CL73959

****

ROBERT B. CAMPBELL, JR., Plaintiff v.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, [Defendant]

****

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Third-party Plaintiff v.

WILLIAM SIEGLEIN, et al., Third-party Defendants

****

JURY VERDICT SHEET (12/13/1991)

1. Was BG&E negligent?
   Yes [X]
   If the answer to #1 is "yes," then continue;
   if "no," then stop.

2. Was Robert Campbell contributorily negligent?
   No [X]
   If the answer to #2 is "no," then continue;
   if "yes," then stop.

3. Did Robert Campbell assume the risk of his injury?
   No [X]
   If the answer to #3 is "no," then continue;
   if "yes," the stop.

4. Was Mark Jenkins negligent? No [X]

5. Was William Sieglein negligent? Yes [X]

6. In what amount do you award damages? $4,850,000

s/ [Forelady - App. M]
FOREPERSON

APPENDIX M

[Campbell COA Petition paragraph **H21**]:

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No. 87323051 / CL73959

****

ROBERT B. CAMPBELL, JR., Plaintiff v.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, [Defendant]

****

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Third-party Plaintiff v.

WILLIAM SIEGLEIN, et al., Third-party Defendants

****

TRANSCRIPT (12/13/1991)

THE COURT: Good afternoon. Please be seated. Bring the Jury. Mr. Gallagher is going to take the Verdict, so bear with us.

(The jury returned to the courtroom at 5:14 p. m.)

THE COURT: Take the verdict.

THE CLERK: Members of the jury, have you agreed upon a verdict?

THE JUROR: We have.

THE CLERK: Who shall speak for you?

THE JUROR: Our forewoman.

THE CLERK: Madame Forelady, please stand. In the case of Robert Campbell, Jr. vs. Baltimore Gas and Electric Company and Baltimore Gas and Electric Company vs. William Sieglein et al., Case No. 87323051 / CL73959. How say you, as to Question No. 1, Was BG&E negligent?

THE FORELADY: Yes.

THE CLERK: How say you, as to Question No. 2, was Robert Campbell contributorily negligent?

THE FORELADY: No.

THE CLERK: How say you, as to Question No. 3, did Robert Campbell assume the risk for his injury?

THE FORELADY: No.

THE CLERK: How say you, as to Question No. 4, was Mark Jenkins negligent?

THE FORELADY: No.

THE CLERK: How say you, as to Question No. 5, was William Sieglein negligent?

THE FORELADY: Yes.

THE CLERK: How say you, as to Question No. 6, in what amount do you award damages?

THE FORELADY: Four point eight five million dollars.

THE COURT: What was the figure again?

THE FORELADY: Four million, eight hundred fifty thousand dollars.

THE CLERK: Would counsel like the jury polled?

MS. BORTZ (Counsel for BG&E): Yes.

THE CLERK: Madam forelady, you may be seated. Juror No. 2, you heard the verdict of the forelady, is your answer the same?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is your answer the same?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12?

JUROR NO. 12: Yes.

THE CLERK: Members of the jury, harken to the verdict as the court has recorded it, the forelady says as to Question No. 1, was BG&E negligent? Your answer was yes. As to Question No. 2, was Robert Campbell contributorily negligent? Your answer was no. As to Question No. 3, did Robert Campbell assume the risk of injury? Answer no. Question No. 4, was Mark Jenkins negligent? Answer, no. As to Question No. 5, was William Sieglein negligent? Answer no – yes on No. 5. And as to Question No. 6, what amount do you award damages? Your answer, four million eight hundred fifty thousand dollars. And so say you all?

THE JURY: Yes.

THE COURT: Members of the Jury, thank you very much. I think that everyone involved in this case agrees that you gave it all the time and attention that you possibly could give, and we are most appreciative of that.

Your responsibility as jurors is now concluded. I want to thank you very much on behalf of all the judges of the Circuit Court for Baltimore City. You can take your badges off. Leave your badges, please, on the clerk's table as you walk out. We have to give you a certificate of employment. Would you hand those out? We will give you an employment certificate in just a moment.

All right. You can begin to step down. You are

free to go. Just leave your badges here, and Mr. Gallagher will give you employment certificates.

MR. GATELY (Counsel for Plaintiff Campbell): Please wait outside. I would like to speak to you.

THE COURT: You are welcome to talk to the lawyers if you like to. You don't have to if you don't want to, and if you don't want to, just simply say you don't want to; they won't press you.

(The jury is excused from the courtroom.)

THE COURT: [Petition paragraph **H21**] Counsel, the reservation of the Motion For Judgment becomes a Motion For Judgment Not Withstanding The Verdict, and I'm ready to rule on that now. I do not need to hear anything more. We have heard extensive arguments with regards to the motion. I have read the memoranda that have been provided to me by counsel.

The Court is aware that if there is any competent evidence , no matter how slight, to support the Plaintiff's case, the case should be submitted to the jury. And the Court is mindful of the fact that modern life includes the hazards of electrical power lines. Nevertheless, the Court's position on the issue of primary negligence is that that issue is one that properly went to the jury. I think it is a factual question for the jury to decide.

In this case, I think there was prima facie evidence presented by the Plaintiff that BG&E deviated from the standard of care of the industry when in the 1960s, I think

it was, the line was upgraded, but at any rate, from the installation and maintenance of the uninsulated line, the installation and maintenance of the uninsulated line in close proximity to the residence where the accident occurred, and which was maintained by Baltimore Gas and Electric up to the date of the accident. So the matter was properly before the jury.

The question of contributory negligence is another matter. Once again, the Court is mindful that it must consider the question of contributory negligence in the light of all the inferences that are favorable to the Plaintiff's case, that may be fairly deduced from the evidence. I find that there were really no disputes as to the material facts in the case, the facts that I think were material to the issue of contributory negligence. And I find that there was, and I'm quoting a number of cases that counsel have presented to me with regards to the issue of the court's finding as a matter of law, that there was contributory negligence, and that it was prominent and decisive and which directly contributed to the accident and which was of such character as to leave no room for difference of an opinion by reasonable minds.

And I find that given the narrowness of the yard in which Robert Campbell and Mark Jenkins were working, clear view of the lines, to attempt to extend a heavy metal ladder in the manner in which it was raised at the point in the yard closest to the wire rather than farthest away is contributory negligence as a matter of law.

The law of Maryland creates a harsh result in this case as it does in cases like this one. If Maryland recognizes comparative negligence, then the Plaintiff's

position would be much different, but it does not, and I govern accordingly.

Therefore, the judgment not withstanding the verdict is granted in favor of the Defendant against the Plaintiff, the Defendant Baltimore Gas and Electric Company, and I think that the other cases fall as a result of that.

I thank you all very much. That concludes this matter [E899-E902].

[The following identifies the above text as actual transcript text attached to Campbell's 2004 Petition]

[CERTIFICATE OF COURT REPORTER

(Text omitted)

s/ Lyn Horne
LYN HORNE
Official Court Reporter
Baltimore City Court]

APPENDIX N

[Attached to Campbell's COA Petition]:

CIRCUIT COURT FOR BALTIMORE CITY

PRESIDING JUDGE: KATHLEEN O'F. FRIEDMAN

COURTROOM CLERK: J. SNOWDEN

STENOGRAPHER: L. BROWN

CASE NUMBER: 87323051

CASE TITLE: CAMPBELL, JR. v. BALTO. GAS & ELEC. CL73959

CATEGORY: OTHER TORT

PROCEEDING: JURY TRIAL - GENERAL

12/13/91 Verdict:
Judgment in favor of Plaintiff (BG&E [sic. - Campbell]) in the amount of $4,850,000.00 and cost. Motion for NOV granted (Plaintiff found contri. neg.). Judgment in favor of Deft. for cost.

TYPE OF PROCEEDING: [X] JURY

DISPOSITION: [X] JUDGMENT ABSOLUTE

JUDGE SIGNATURE: s/ Kathleen O'Ferrell Friedman

DATE: 12/13/91

APPENDIX O

[Attached to Campbell's COA Petition]:

REPORTED AS 95 Md. App. 86, 619 A.2d. 213 (1993)

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 732, September Term 1992

ROBERT B. CAMPBELL, JR., [Appellant] v.

BALTIMORE GAS & ELECTRIC COMPANY,
[Appellee]

Garrity,
Bloom,
Davis,
JJ.

OPINION by Garrity, J.

FILED: February 1, 1993

This case arises out of an accidental contact between an aluminum ladder being raised by appellant and an overhead electrical line operated by BG&E. Following a jury verdict, in favor of appellant, the trial judge granted BG&E's Motion for Judgment NOV, ruling that appellant was barred from recovery because he had been contributorily negligent as a matter of law.

BACKGROUND

On the morning of April 7, 1986, William Sieglein, Mark Jenkins, and Robert B. Campbell, Jr. respectively owner, foreman, and employee of Sieglein Roofing and Siding Co., Inc. (S. R. S. C.), arrived at a residential property in Baltimore County, Maryland, where they were to install aluminum siding. After arriving at the site, Sieglein walked around the house with Jenkins, explaining what work was required. Campbell, meanwhile, unloaded materials from the company truck. Sieglein thereafter left the premises without discussing the work with Campbell and without saying anything regarding the overhead electrical wires near the house.[1]

[1]The summary of facts and evidence reflects the fact that in considering this appeal we must examine the facts and all reasonable inferences based on the facts in the light most favorable to appellant. Franklin v. Gupta, 81 Md. App. 345 (1990).

Sieglein testified that in advance of siding work he usually visited the job site in order to prepare an estimate and determine whether any overhead utility wires, most typically a 110-volt "service drop" line connecting the electrical system of a house to the utility's high voltage lines, needed to be moved before commencing work. There was evidence that it was standard procedure for Sieglein to contact BG&E to move an overhead line dangerously close to a work site.[2]

[2]Maryland's High Voltage Line Act, Md. Labor and

Employment Code Ann. § § 6-101 et. seq., prohibits any person from performing work within 10 feet of overhead power lines unless the utility has first been notified and given the opportunity to take appropriate protective measures. In referring to the statute and the testimony concerning the procedure by which Sieglein contacted the utility, we do not address Sieglein's potential liability under the statute.

The layout of overhead electrical wires at the subject job site on the day of the accident consisted of five overhead electrical lines grouped together approximately 9 ½ feet from the east side of the house and two to three feet beyond a chain link fence marking the boundary of the property. In addition, there was a single line that ran slightly diagonal to these other lines.[3] This line was closer to the house but still beyond the fence marking the boundary of the property. All of the wires were in plain view on a clear day.

[3]This line ran from one utility pole to an arm extending from a second pole. Thus, it ran in the same general direction as the other lines, but at a slightly different angle.

After viewing the overhead lines, Sieglein determined that the lines were safely away from the house by at least ten feet and, therefore, he did not notify BG&E of the siding work or request that the lines be moved while the aluminum siding was installed. Jenkins, the foreman,

based on his own observations, concluded that the overhead lines would not interfere with the installation and posed no danger. Campbell testified that he also noticed the overhead lines. He assumed the lines carried electricity, but since they appeared to be safely beyond the fence marking the property line, Campbell began work without any further consideration of the proximity of the lines to the job site.

The job that day consisted primarily of the installation of soffit and siding beneath a roof eave running along the east side of the house. The division of labor between Campbell and Jenkins was such that Campbell was engaged almost exclusively in cutting and bending soffit pieces that he then handed to Jenkins. Jenkins, in turn, took these materials up the ladder and completed the installation. The work progressed uneventfully until Jenkins needed to extend the 40 foot ladder in order to reach a point where the roof eave rose sharply to a peak. Jenkins called to Campbell, who was at a work table in the backyard, to come to the side of the house and help raise the ladder. Since the ladder weighed approximately 100 pounds and did not have a rope attached to the pulley normally used to extend the ladder, it was difficult and awkward to extend. On this day, the two men attempted to extend the ladder using a method Jenkins had devised and that the two men had used on numerous occasions without incident. Employing their unique but usual method of extending the ladder, Campbell positioned himself between the ladder and the fence. As he braced himself against the fence, while standing upon tilting cinder blocks with holes, Campbell held the ladder steady in an upright and vertical

position. He did not look up toward the top of the ladder because the overhead wires appeared to him to be outside the fence. Jenkins, facing Campbell (facing away from the house and toward the overhead lines) looked up toward the overhead line that appeared to be well outside the fence, but did not notice any wire overhead. While Campbell held the ladder steady in a vertical position, Jenkins extended the top section of the ladder upward. He then stepped up a rung on the ladder and pushed the top section further upward. Jenkins then ascended up two (possibly more) additional rungs and repeated the procedure. As he extended the top section, he heard a noise and jumped off the ladder. The ladder had struck an overhead line later identified as an uninsulated 7,600 volt distribution line, which was approximately nine feet lower than the roof overhang. Tragically, Campbell was very seriously injured as a result of the ladder contacting the distribution line.

The Sieglein crew had apparently failed to notice the distribution line. It was closer to the house and a few feet higher than the cluster of five other overhead lines that were outside the fence that had been observed by Sieglein and the two Sieglein employees present on the job site that day.

On November 19, 1987, appellant filed this action against BG&E in the Circuit Court for Baltimore City. In his Complaint, appellant alleged that he was injured when a forty-foot ladder he helped raise contacted an overhead electrical line, and that the injuries he sustained had been caused by the negligence of BG&E.[4] BG&E countered that Campbell was barred from recovering due to his own contributory negligence. In addition, BG&E filed a Third-

Party Complaint against appellant's co-workers Mark Jenkins, and his employer, William Sieglein, Inc., alleging that the negligence of Jenkins and Sieglein had caused the electrical contact accident.

> [4]A strict liability count was dismissed from the Complaint on March 29, 1988. The dismissal of this second count is not before this court on appeal.

In the aftermath of a two-week trial (Friedman, J., presiding), the jury rendered its verdict in response to questions presented in a special verdict sheet. It found negligence on the part of BG&E and Sieglein, no negligence by Jenkins[5] and no contributory negligence or assumption of risk by Campbell. The jury awarded Campbell $4,850,000 in damages. The trial court then dismissed the jurors and, treating BG&E's earlier Motion for Judgment (upon which it had reserved ruling) as a Motion for Judgment NOV, ruled that appellant was contributory negligent as a matter of law and granted BG&E's Motion for Judgment NOV.

> [5]The jury's finding that Jenkins was not negligent was not the subject of a Motion for Judgment NOV and is not presented for our review on appeal.

Campbell appeals from the court's granting of the Motion for Judgment NOV. BG&E cross-appeals, arguing that should this court reverse the trial court's granting of the Motion for Judgment NOV, we should then further hold that the trial court erred in instructing the jury and

should have given BG&E's proposed instructions on contributory negligence and assumption of the risk. Sieglein argues on appeal that the trial court erred in denying Sieglein's motion to dismiss and for summary judgment and in denying Sieglein's Motion in Limine.

QUESTIONS PRESENTED

Several issues, presented by three of the parties to the litigation, are now before this court, namely:

1. Whether the trial court erred in finding contributory negligence as a matter of law and granting BG&E's Motion for Judgment NOV.
2. Whether the trial court erred in refusing to instruct the jury on comparative negligence.
3. Whether the trial court erred in not instructing the jury on issues of contributory negligence and assumption of the risk as requested by BG&E.
4. Whether the trial court erred in denying Sieglein's motion to dismiss and motion for summary judgment.
5. Whether the trial court erred in denying Sieglein's Motion in Limine.

ANALYSIS

1. Judgment NOV based upon Campbell's Contributory Negligence.

Ordinarily, the question of whether the plaintiff has been contributorily negligent is for the jury, not the judge, to decide. Diffendal v. Kash and Karry Serv. Corp., 74

Md. App. 170 (1988). For example, in Potomac Edison Co. v. State, 168 Md. 156 (1935), and State v. Potomac Edison Co., 166 Md. 138 (1934), the issue of contributory negligence was held to be properly left for determination by the trier of facts because the evidence permitted a reasonable conclusion that the decedent neither knew nor should have known that the wire was dangerous.

The trial court may, however, take the issue of contributory negligence from the jury and rule that there was contributory negligence as a matter of law when the undisputed facts of the case support such a finding as a matter of law. Le Vonas v. Acme Paper Board Co., 184 Md. 16 (1944).

In considering a Motion for Judgment NOV, a trial judge must consider all evidence and inferences in the light most favorable to the party against whom the motion is made. Md. Rule 2-519(b). On appeal, we must likewise assume the truth of all credible evidence and all inferences of fact reasonably deducible from it tending to sustain appellant's contentions. If, in doing so, we find any legally relevant and competent evidence, however slight, from which the jury could rationally have found in Campbell's favor, we must reverse the Judgment NOV. Franklin v. Gupta, 81 Md. App. 345 (1990), citing Impala Platinum v. Impala Sales, 283 Md. 297 (1978) and McGarr v. Boy Scouts of America, 74 Md. App. 127 (1988).

In ruling on BG&E's Motion for Judgment NOV, the trial judge found that as a matter of law Campbell was contributorily negligent and stated her reasons as follows:

> [T]he Court is mindful that it must consider

> the question of contributory negligence in the light of all the inferences that are favorable to the Plaintiff's case, that may be fairly deduced from the evidence. I find that there were really no disputes as to the material facts in the case, the facts that I think were material to the issue of contributory negligence. And I find that there was, and I'm quoting a number of cases that counsel have presented to me with regards to the issue of the court's finding as a matter of law, that there was contributory negligence, and that it was prominent and decisive and which directly contributed to the accident and which was of such character as to leave no room for difference of an opinion by reasonable minds.
>
> And I find that given the narrowness of the yard in which Robert Campbell and Mark Jenkins were working, clear view of the lines, to attempt to extend a heavy metal ladder in the manner in which it was raised at the point in the yard closest to the wire rather than farthest away is contributory negligence as a matter of law.

Appellee argues that several Maryland cases that directly address the issue of contributory negligence in electrical contact cases support the trial judge's decision to grant the Motion for Judgment NOV. We agree.

In Liscombe v. Potomac Edison Co., 303 Md. 619 (1985), The Court of Appeals discussed and reiterated the continued viability of a long line of cases related to contributory negligence as a matter of law in electrical

contact cases such as the case presently at bar. The many cases cited in this opinion stand for the proposition that "when a person voluntarily touches, or approaches nearer than a reasonable prudent person would, an electrical wire, which he knows, or which a person of ordinary knowledge and experience would have reason to believe, is sufficiently charged with electricity to be dangerous, and in consequence thereof he is injured, it will be assumed as a matter of law that his own negligence contributed to the accident." Liscombe v. Potomac Edison Co., 303 Md. At 629, citing, Le Vonas v. Acme Paper Board Co., 184 Md. at 20.

It is undisputed that the 7,600-volt uninsulated overhead distribution line, which Campbell claims he failed to notice, was clearly visible from the ground. Accepting as fact Campbell's testimony that he did not see the particular 7,600-volt distribution line overhead and thought that it was safe to raise the ladder near the overhead lines that he had earlier observed, there is still no question that had Campbell inspected the area more thoroughly when he first arrived, inspected the area immediately prior to raising the ladder or simply looked straight up when he participated in raising the ladder, he would have seen the 7,600-volt distribution line overhead[6]. Campbell suspected that those overhead lines he did see carried electricity and, due to a recent accident in which he received an electrical shock, appreciated that electricity posed a danger. Despite the clear danger of nearby overhead lines, Campbell helped raise the ladder from a position directly adjacent to those overhead lines.

> [6]Whether appellant actually saw the overhead 7,600 volt distribution line is irrelevant. He is charged with knowledge of seeing an object, which if he had used his senses, he would have seen. So. Md. Electric v. Blanchard, 239 Md. 481, 490-491 (1965). Moreover, it s clear that appellant saw potentially dangerous wires within a few feet of the wire he actually contacted.

We are satisfied that these facts support the trial judge's ruling that Campbell was contributorily negligent as a matter of law. The applicable Maryland case law compels such a decision based on the fact that prior to participating in raising the ladder Campbell was generally aware of the existence and potential dangers such lines presented, and that he failed to look up to make certain that there were no power lines overhead.

Citing Arkansas Power & Light Co. v. McGowan, 296 S.W.2d 420 (Ark. 1956), appellant argues that since he was not the foreman of the project he could rely on the foreman's determination that the site selected by the foreman Jenkins was a safe place to raise the ladder. The Arkansas Power decision, however, which dealt with a contact between an aluminum ladder and an overhead line, is not controlling. Aside from the fact that the case was decided under Arkansas law, it was also factually different in several important respects. Unlike the case sub judice, McGowan was an inexperienced new worker who lacked any knowledge of the existing danger.

Under Maryland law, it is clear that a person may rely on assurances of safety made to him by others in a

situation where an ordinary prudent person would do so. Erdman v. Johnson Brothers, 260 Md. 190 (1970). It is equally clear, however, "that such assurances do not relieve a person from the duty of caring for his own safety, and a person cannot rely on another's assurances where he is aware of the danger involved or where the danger is obvious enough that an ordinary prudent person would not so rely." Erdman v. Johnson Brothers, 260 Md. at 205.[7]

[7]This same principle was applied in an electrical contact case in Driver v. Potomac Electric, 247 Md. 75 (1966).

In presenting his argument on this point, Campbell stresses the following facts. Mr. Sieglein, who had long experience in the siding installation industry, had twice inspected the premises and failed to warn Campbell of the danger presented by nearby overhead lines. Mr. Jenkins, Campbell's supervisor, had selected the place and method to be used to raise the ladder. Campbell's main task that day was to prepare materials to be used by Jenkins as he ascended the ladder and actually installed the material on the house. When asked to assist the foreman in extending the ladder, Campbell was called away from his other duties preparing soffit material in the backyard. Campbell's role in raising the ladder was simply to hold the base of the ladder straight and upright and, given the manner in which the ladder was raised, Campbell's attention was naturally focused on holding the base of the ladder steady.

Aside from a concern that a superior's failure to warn an employee of danger amounts to an assurance of safety, we are not convinced by appellant's argument for a

more basic reason. Campbell knew of the existence of overhead lines only a few feet behind the fence he used to brace himself as he held the ladder upright. He appreciated that these lines were potentially dangerous. While his supervisor may not have warned Campbell of the potential danger of extending the ladder so near overhead lines, and hence implicitly assured him that the operation was safe, Campbell was not relieved from the duty of caring for his own safety. The potential danger was obvious and even if Campbell did not see the particular line that caused his injuries, he knew that potentially dangerous wires were nearby and would have seen the distribution line had he simply looked overhead. By raising the ladder in the vicinity of potentially dangerous overhead lines and not looking up or otherwise ascertaining that this was a safe place to raise the ladder, Campbell, who had approximately seven years experience as a siding installer or helper, failed to care for his own safety despite an obvious danger and was, therefore, as a matter of law, contributorily negligent.

Accordingly, as we hold that there exists no reasonably competent evidence from which a jury could rationally find that Campbell was not contributorily negligent, we must affirm the trial court's granting of BG&E's Motion for Judgment NOV.

2. Comparative Negligence Instruction

Despite Campbell's criticism of Maryland's law of contributory negligence as "a vestigial doctrine, likely to be replaced sooner or later by comparative negligence," we are bound by the Court of Appeals' clear rejection of the doctrine of comparative negligence. We hold, therefore,

that the trial court did not err in refusing to instruct the jury on comparative negligence. Harrison v. Montgomery County Bd. of Educ., 295 Md. 442, 456 (1983).

Having affirmed the trial court's granting of BG&E's Motion for Judgment NOV on the basis of Campbell's contributory negligence, we need not address the other issues raised by BG&E and Sieglein.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

APPENDIX P

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 732, September Term 1992

ROBERT B. CAMPBELL, JR., [Appellant] v.

BALTIMORE GAS & ELECTRIC COMPANY,
[Appellee]

MOTION FOR RECONSIDERATION:

Filed: March 1, 1993
Denied: March 30, 1993

In accordance with documents scanned into the Maryland State Archives computer in February, 2004, the actual formal denial document was the front page of "Appellant's Motion for Reconsideration" [See Record page R291]. The document was filed with a date stamp March 1, 1993 at 2:46 p. m. The following handwritten and then scribbled out sentences are in the top right, "Granted. Part [illegible] to be revised." Below this was handwritten, "Denied by Panel. s/ A. M. Wilner [The then Chief Judge of the Court of Special Appeals of Maryland] 3/30/93".

APPENDIX Q

REPORTED AS 331 Md. 169, 627 A.2d. 538 (1993)

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 117, September Term 1993
(No. 732, September Term 1992,
Court of Special Appeals)

ROBERT B. CAMPBELL, JR., [Petitioner] v.

BALTIMORE GAS & ELECTRIC COMPANY,
[Respondent]

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answers filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert M. Bell
CHIEF JUDGE

DATE: July 21, 1993

APPENDIX R

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 117, September Term 1993
(No. 732, September Term 1992,
Court of Special Appeals)

ROBERT B. CAMPBELL, JR., [Petitioner] v.

BALTIMORE GAS & ELECTRIC COMPANY,
[Respondent]

ORDER

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 15th day of September, 1993

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

s/ Robert M. Bell
CHIEF JUDGE

APPENDIX S

[Attached to Campbell's COA Petition]:

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No. 87323051 / CL73959

ROBERT B. CAMPBELL, JR., Plaintiff v.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Defendant

ORDER

Upon consideration of Plaintiff's Maryland Rule 2-342 Motion for Leave to Amend Motion for Revisory Powers and Request for Hearing, Defendant's Response thereto, and Plaintiff's Reply to Defendant's Response, it is this 16th day of September 2004,

ORDERED that the Plaintiff's Motion is DENIED.

s/ Carol E. Smith
JUDGE

cc: All Parties

APPENDIX T

[Attached to Campbell's COA Petition]:

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No. 87323051 / CL73959

ROBERT B. CAMPBELL, JR., Plaintiff v.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Defendant

ORDER

Upon consideration of Plaintiff's Maryland Rule 2-535(b) Motion for Revisory Powers, Defendant's Opposition thereto, and Plaintiff's Reply to Defendant's Opposition, it is this 16th day of September 2004,

ORDERED that the Plaintiff's Motion is DENIED.

s/ Carol E. Smith
JUDGE

cc: All Parties

APPENDIX U

[Attached to Campbell's COA Petition]:

IN THE CIRCUIT COURT FOR BALTIMORE CITY

Case No. 24-C-87323051 / CL73959*

ROBERT B. CAMPBELL, JR., Plaintiff v.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Defendant

ORDER

Upon consideration of Plaintiff Robert B. Campbell, Jr.'s Motion to Alter or Amend a Judgment - Court Decision and Defendant's Opposition thereto, it is this 3rd day of November, 2004,

ORDERED that Plaintiff's Motion to Alter or Amend a Judgment - Court Decision is DENIED.

s/ Carol E. Smith
JUDGE

[* - The Case No. changed slightly from 87323051 / CL73959 to **24-C**-87323051 / CL73959.]

APPENDIX V

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 490, September Term 2004
(No. 1932, September Term 2004,
Court of Special Appeals)

ROBERT B. CAMPBELL, JR., [Petitioner] v.

BALTIMORE GAS AND ELECTRIC COMPANY, [Respondent]

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

s/ Robert M. Bell
CHIEF JUDGE

DATE: December 23, 2004

APPENDIX W

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 490, September Term 2004
(No. 1932, September Term 2004,
Court of Special Appeals)

ROBERT B. CAMPBELL, JR., [Petitioner] v.

BALTIMORE GAS AND ELECTRIC COMPANY, [Respondent]

ORDER

The Court having considered the motion for reconsideration filed, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

s/ Robert M. Bell
CHIEF JUDGE

DATE: March 14, 2005*

[* - This is the denial date of Campbell's 2004 Petition for Rehearing in the Court of Appeals of Maryland. In accordance with Supreme Court Rules 12.4 to 12.6, Respondent Campbell may file a supporting Conditional Cross-Petition within 20 days (not to be extended) after the docketing of this Petition in the Supreme Court.]

APPENDIX X

Petitioner's COA Petition paragraph **H1**
(February 11, 2003)

"Petitioner's February 11, 2003 Complaint in Mercer v. Thomas, Case No. CAL03-02711, contained an 'Election for Trial by Jury' and prayed for $1,858,229 plus interest in economic damages plus punitive damages (pages 7-8 within [E8-E15])."

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

COMPLAINT (February 11, 2003)

GREGORY SHAWN MERCER, Plaintiff
5966 Westchester Park Drive
Unit #202
College Park, Maryland 20740

v. Case No. CAL03-02711

WILLIAM ALOYSIOUS THOMAS, III, Defendant
655 Tallcottville Road
Unit #54
Vernon Rockville, Connecticut 06066

COMPLAINT
(Perjury, Fraud)

COMES NOW the petitioner, Gregory Shawn Mercer, pro se, and respectfully presents this complaint against William Aloysious Thomas, III (hereafter "Defendant"), and states as and for his complaint the following:

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to Courts and Judicial Proceedings Code §1-501, this being a civil action for damages and arising from the conduct by Defendant during the course of Prince George's County Circuit Court Case No. CAL94-21066, Mercer v. Thomas, et al., when he was named and appeared before this court as a defendant.

2. Venue is properly laid in this Court pursuant to Courts and Judicial Proceedings Code §6-202, because the Defendant's conduct, perjury, and fraud occurred in Prince George's County.

PARTIES

3. Plaintiff, Gregory Shawn Mercer, resides at 5966 Westchester Park Drive, Unit #202, College Park, Maryland, 20740. Defendant, William Aloysious Thomas, III, resides at 655 Tallcottville Road, Unit #54, Vernon Rockville, Connecticut, 06066.

FACTS

4. On or about November 28, 1992, Defendant was

driving east in the right of two lanes on eastbound Good Luck Road, approaching the intersection with Trexler Road, in Prince George's County, Maryland.

5. In the lane to Defendant's left, John Edward Lumsden was driving his vehicle, a Ford Econoline van.

6. Approximately 241 feet prior to its intersection with Trexler Road, Good Luck Road transforms from a two-lane to a one-lane road, which is controlled by a traffic control device approximately 281 feet prior to the intersection notifying drivers in the right lane to merge into the left lane.

7. A solid white channeling line begins to restrict the single eastbound Good Luck Road lane from the south approximately 75 feet prior to its intersection with Trexler Road.

8. At the intersection of Good Luck Road and Trexler Road, Plaintiff was occupying the merged, single lane on Good Luck Road, waiting to make a left turn into Trexler Road at or about 7:17 pm on November 28, 1992.

9. John Edward Lumsden attempted to drive to the right of Plaintiff, but instead struck Plaintiff's vehicle because Defendant had not merged behind Lumsden, pursuant to the traffic control device, and instead was to Lumsden's right attempting to pass Lumsden and blocking Lumsden's right of way; Lumsden had not signaled a left turn onto Trexler Road, had not activated his brake lights

and was not making or about to make a left turn.

10. Plaintiff suffered massive bodily injuries as a result of the ensuing accident, and consequently brought Prince George's County Circuit Court Case No. CAL94-21066, Gregory Shawn Mercer v. William Aloysious Thomas, III, et al., seeking recovery. (See Exhibit 1, Copy of Second Amended Complaint and Election for Trial by Jury).

11. On a presently indeterminate but discoverable date in Defendant's statement to his insurance carrier, Defendant reported that he could see Plaintiff's vehicle immediately prior to John Edward Lumsden's vehicle striking Plaintiff's vehicle and that Defendant's vehicle had been along side to the right of Lumsden's van with Plaintiff's vehicle directly in the path of Lumsden's van on a 391-foot straight section of Good Luck Road. (See Exhibit 2, Written Statement by William Aloysious Thomas, III, to his insurer, Geico Insurance Company; and Exhibit 3, Mercer Automobile Accident Analysis by Clyde C. Richard, Ph. D., P. E., 1/15/03).

12. On June 19, 1997, Defendant, while under oath, gave testimony which materially contradicted his statement to his insurance carrier; Defendant testified that his view of the Plaintiff's vehicle was obstructed by nothing other that John Edward Lumsden's van for a period of between five and thirty seconds prior to impact while Defendant was traveling between 30 to 35 miles per hour to the right of the van on a 391-foot straight section of Good Luck Road offering continuous sight of the Mercer vehicle

ahead for at least 7.4 seconds. (See Exhibit 3, Mercer Automobile Accident Analysis by Clyde C. Richard, Ph. D., P. E., 1/15/03; and Exhibit 4, Deposition of William Aloysious Thomas, III, pages 15, 29 - 31 [E34, E48 - E50]).

13. On January 15, 1998, at trial in the Prince George's County Circuit Court, Defendant affirmed his June 19, 1997, testimony that his field of vision to the Plaintiff's vehicle was obstructed for the range of between five and thirty seconds and noted Mercer has on-coming traffic immediately prior to impact. (See Exhibit 5, Transcript of Mercer v. Thomas, et al., 1/15/98, pages 2-24 to 2-25, 2-84, 2-90 [E66 - E67, E74, 2-90]).

14. The statements made by Defendant in court were false and with the intent to mislead the Plaintiff and the Court, and to prevent Plaintiff from taking the steps necessary to successfully prosecute his case.

15. The Circuit Court found Defendant to have been negligent , but Plaintiff was barred from recovery because he was found to have been contributorily negligent.

16. Had Defendant fulfilled his obligation to tell the truth during the Circuit Court proceedings, then Plaintiff would have been able to gather and present evidence to have met the threshold for a successful last clear chance defense against the contributory negligence barrier.

17. But for the Defendant's civil perjury and fraud,

Plaintiff would have argued Thomas was primarily negligent violating TA 21-801(h) by not reducing his vehicular speed when he saw the special danger as to other traffic with Mercer motionless directly in the path of Lumsden's 30-mile-per-hour van. Mercer may have been contributorily negligent after Thomas' view of Mercer's vehicle was blocked by the van violating TA 21-402(a) and TA 21-604(c) by not yielding to on-coming traffic when using westbound's lane for Mercer's left front vehicular corner in order to move the Mercer vehicle's left side closer to the double yellow line and by not signaling to the right when fully reentering the eastbound lane when Mercer's left front vehicular corner was in westbound's lane. Thereafter, Thomas was secondarily negligent for at least 7.4 seconds violating TA 21-901.1(b) by negligently driving when he ignored the obvious merge-to-left traffic control device 2.4 seconds ahead, saw no indication the van was making or about to make a left turn with the activation of a turn signal or brake lights, continuously saw the Mercer vehicle stopped in front of the moving-at-speed-limit van, attempted to pass the van, and actually moved along side the van blocking its ability to pass the left-turning Mercer vehicle on its right. (See Exhibit 3, Mercer Automobile Accident Analysis by Clyde C. Richard, Ph. D., P. E., 1/15/03).

18. Plaintiff suffered an estimated $1,858,229 in economic damages. (See Exhibit 6, Valuation of Lost Income and Benefits of Mr. Gregory Mercer by Dr. Richard B. Edelman).

19. Plaintiff discovered Defendant's civil perjury and fraud on January 15, 2003, when Dr. Clyde C. Richard completed his report commencing a 3-year statute of limitations to file this suit. (See Exhibit 3, Mercer Automobile Accident Analysis by Clyde C. Richard, Ph. D., P. E., 1/15/03).

COUNT 1 - CIVIL PERJURY
(Defendant made materially false statements while under oath which were intended to prejudice or damage Plaintiff's case.)

20. Paragraphs 1 through 19 are incorporated by reference and re-alleged as if fully set forth herein.

21. Defendant had a duty to truthfully report his accident to his insurance carrier, and he did so.

22. Defendant had a duty to truthfully testify during his sworn deposition and during the in-court proceedings in the Prince George's County Circuit Court.

23. Defendant's statements to his insurance carrier occurred much closer in time to the accident than did his in-court statements.

24. Defendant's in-court statements are not only later-in-time to those reported to his insurance carrier, but they materially contradict his prior-in-time report to his insurance provider.

25. Defendant had no motive to lie to his insurance carrier and had a fresher recollection of the facts when he made that statement.

26. Defendant lied to the Court and to Plaintiff about not being able to see Plaintiff's vehicle for the sake of protecting himself against having to take responsibility for the massive injuries caused to Plaintiff by Defendant's negligent behavior.

COUNT 2 - FRAUD

27. Paragraphs 1 through 26 are incorporated by reference and re-alleged as if fully set forth herein.

28. Defendant made materially misleading statements, while under oath, to the Court and to Plaintiff.

29. Defendant's intent was to mislead Plaintiff, for the purpose of avoiding liability for his negligent behavior.

30. Plaintiff was barred from recovery because of having been found to have been contributorily negligent, but had it not been for Defendant's lies while under oath, Plaintiff would have been able to have constructed a successful last clear chance argument.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that the Court enter judgment against Defendant, William Aloysious

Thomas, III, in the amount of one million eight hundred fifty-eight thousand two hundred twenty-nine dollars ($1,858,229) and/or such other amounts of (1) compensatory and general damages for all legal fees and associated costs incurred by Plaintiff in his case against William Aloysious Thomas, III, et al.; (2) punitive and exemplary damages as may be determined by jury verdict, with each of the foregoing counts, to be just and proper; (3) Plaintiff prays Further, for interest thereon, the cost of suit herein, and further relief as may be in the interest of justice.

Respectfully submitted,

s/ Gregory S. Mercer
GREGORY SHAWN MERCER
Plaintiff, pro se
5966 Westchester Park Drive, Unit #202
College Park, Maryland 20740
301-982-9444

ELECTION FOR TRIAL BY JURY

COMES NOW the Plaintiff, Gregory Shawn Mercer, pro se, and demands a Trial by Jury on all issues in this case.

s/ Gregory S. Mercer
GREGORY SHAWN MERCER, pro se

[Complaint, pages E8 - E15 in Joint Record Extract, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Brief of Appellant, pages 1 - 2, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. Extracted in Petition for Writ of Certiorari, paragraph **H1**, page 5, Mercer v. Thomas, Court of Appeals of Maryland, Petition No. 434]

APPENDIX Y

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

GREGORY SHAWN MERCER, Plaintiff

v. Case No. CAL03-02711

WILLIAM ALOYSIOUS THOMAS, III, Defendant

COMPLAINT EXHIBIT #2 (February 11, 2003)

First part of Thomas' statement
(Between November 28, 1992 and June 21, 1993)

To whom it may concern,

I, William A. Thomas, III, am providing this written statement of my account of how the accident on Good Luck Road and Trexler Road, which occurred on November 28, 1992, was caused. I have provided a copy of the Police Motor Vehicle Accident Report, which has a diagram of the progress of the accident. I hope that it, along with this statement, is helpful in correctly determining which party was at fault for causing this accident.

I was traveling in the right, eastbound lane on Good Luck Road as the van, which I believe caused the accident, was

in the left, eastbound lane. The van, driven by a John Lumsden (vehicle #1 in the diagram), was slightly ahead of me (vehicle #3) in the left lane when I noticed that there was another vehicle (vehicle #2) in front of him waiting to make a left turn off of Good Luck Road onto Trexler Road. Seeing this, and knowing that after passing Trexler Road, Good Luck Road becomes a one lane street in both directions, I realized that vehicle #1 would have to slow down and wait for vehicle #2 in front of him to complete his turn before he could continue to travel on Good Luck Road, therefore I proceeded to accelerate in an attempt to pass vehicle #1.

However, as I accelerated and came to be beside vehicle #1, I noticed that the driver looked over at me and then he too accelerated, thus making it impossible for me to pass him at the speed which I was traveling. I believe that the driver of vehicle #1 intentionally accelerated in an attempt to keep me from passing him.

The next thing which I remember was that I heard the collision of vehicle #1 with vehicle #2 which then caused vehicle #1 to collide with me. I immediately began to brake and eventually came to rest near the curve as vehicle #1 came to rest in the middle of the street some distance in front of me. However, vehicle #2 was forced into the path of oncoming traffic and was then struck again by another vehicle (vehicle #4), before finally coming to rest on the curve of the corner of the westbound lane of Good Luck Road and Trexler Road.

Petitioner's COA Petition paragraph **H11**
(Between November 28, 1992 and June 21, 1993)

[Complaint, Exhibit 2, Respondent's Present-Sense Truthful Insurance Statement (E20, E149 - E176), dated after November 28, 1992 Advise of Rights and Waiver Form (E107) but before June 21, 1993 GEICO Claim-Denial Letter (E111)]:

"I believe that the driver of vehicle #1 is at fault because he failed to yield to a slower moving vehicle which was in front of him. Although he has stated that vehicle #2 began to make a left turn and then aborted the turn, he probably failed to mention that he accelerated to keep me from passing him, instead of braking to keep from colliding with the vehicle in front of him, which was virtually motionless.

This account of the accident on Good Luck Road and Trexler Road on November 28, 1992 is, to the best of my knowledge, truthful, complete and accurate.

Cordially,
(Signed William A. Thomas, III)"

[Respondent Thomas' Present-Sense Truthful Insurance Statement, Complaint Exhibit #2, pages E20 and E176 in Joint Record Extract, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Referred to Brief of Appellant, pages 2, 9 - 10, and Reply Brief of Appellant, page 2 - 3, Mercer v. Thomas,

Court of Special Appeals of Maryland, September Term 2003, No. 1713. Extracted in Petition for Writ of Certiorari, paragraph **H11**, page 11, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

APPENDIX Z

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

GREGORY SHAWN MERCER, Plaintiff

v. Case No. CAL03-02711

WILLIAM ALOYSIOUS THOMAS, III, Defendant

COMPLAINT EXHIBIT #3 (February 11, 2003)

MERCER AUTOMOBILE ACCIDENT ANALYSIS
Clyde C. Richard, Ph. D., P. E.
Mechanical Engineer
CED Case No.: 4776.1
January 15, 2003

I have been asked to perform calculations related to an automobile accident that occurred on November 28, 1992 involving vehicles driven by Mr. Greg Mercer, Mr. Lumsden and Mr. Thomas. This accident occurred on a straight section of Good Luck Road.

The purpose of my calculation is to determine the ability of Mr. Thomas to have seen the Mercer vehicle at a sufficient time and distance to have altered the course of this accident.

My calculations are based on the following facts and

assumptions:

Lumsden's van was initially traveling at 30 mph in the center of the roadway's left lane.

At a distance close to the stopped Mercer vehicle Lumsden looked back and saw Thomas' Honda 15 feet behind his van.

Lumsden decided to accelerate his van and pull to the right to avoid hitting the rear of Mercer.

The time it took Lumsden to look back and decide to accelerate was 1.5 seconds.

Lumsden was able to accelerate his van at 1/4g or 0.81 ft. per second squared to a speed of 35 mph.

Lumsden's van was 17.7 feet long and 79.5 inches wide.

Thomas was traveling at 35 mph during the entire accident.

Thomas' Honda was 15 feet long and 67 inches wide.

The right rear of Lumsden's van hit the left side of Thomas' Honda 5 feet back from the front bumper of the Honda.

Thomas' eyes were 8 feet back from the front bumper of the Honda and 30% of the distance to the left side of the Honda.

The roadway was straight for 398.1 feet prior to the impact point.

The roadway curved gently prior to the straight section of roadway.

At a distance of 255 feet from the impact point Thomas passed by a sign that indicated that the roadway's right lane ended.

The roadway was 22 feet wide with each lane being 11 feet wide.

Both the Lumsden van and the Thomas Honda were traveling in the center of their respective lanes.

Mercer saw three headlights in his rearview mirror at the first time the headlights could be seen and immediately attempted to move his car closer to the roadway's center lane at an acceleration and deceleration rate of 1/4g.

Additionally, I have measured portions of the roadway where this accident occurred. Based on this set of facts and assumption, I was able to calculate that 7.4 seconds before impact the front of Lumsden's van was 328.9 feet from the impact point. At this same time the front of Thomas' Honda was 49.8 feet behind the rear of Lumsden's van and 398.1 feet from the impact point.

The Lumsden van is on the straight portion of the roadway at this time and the Thomas Honda is on a portion of the

roadway that has a curve. The curve in the roadway prior to the straight section of road before the impact is not significant for the few feet seen in this calculation (391 ft. straight as measured and 398.1 feet for the front of the Thomas Honda). I was able to show geometrically that Thomas should have been able to easily see the entire back of the Mercer vehicle as he rounded the curve and was 7.4 seconds and 398.1 feet from the impact point.

In fact, Thomas can see the entire stopped Mercer vehicle for more than the 7.4 seconds as the roadway is only slightly curving and the Thomas car is not significantly behind the Lumsden van during more of the curve. Additionally, Thomas can see various portions of the Mercer car for an additional period of time. The van blocks Thomas' line of sight in such a way that as Thomas gains on the van at a rate of 5 mph or 7.3 ft./sec., Thomas can initially see the right rear of the Mercer car. As Thomas gains additional distance on the van and further rounds the corner, Thomas can see the entire back of the Mercer car.

The additional time that Thomas could see the full Mercer car or portions of the Mercer car is as much as 3 to 4 seconds of additional time. This translates into a total time for Thomas to see at least a portion of the Mercer car of 10.4 to 11.4 seconds (153.9 to 205.2 feet more than the 398.1 feet that corresponds to the 7.4-second figure). The exact distance and time will be demonstrated in a scale model that will be constructed. The model will allow for an accurate demonstration of the sight line of Thomas

relative to the Mercer vehicle as Thomas passes by the Lumsden van and progresses toward the collision point.

At approximately 5 seconds prior to impact and 255 feet from impact, Thomas passed a sign to his right that showed that his lane ended and he must merge to the left. Obviously, Thomas could see this sign well in advance of actually passing the sign. When passing the lane ends sign, the front bumper of Thomas' Honda was more than 30 feet behind the rear of the Lumsden van. It would have been prudent and an easy task for Thomas to have pulled safely to the left into the lane behind the Lumsden van when he initially saw and/or was at the sign that showed that the lane in which Thomas was traveling was about to end. Had Thomas reacted to this sign and/or slowed down rather than maintaining his speed and continuing to drive on the right side of the roadway which eventually blocked Lumsden from moving right of Mercer, this accident would not have occurred.

Mercer reported that he had initially wanted to pull into a street that was left of the roadway on which he was traveling. As Mercer approached the street he noticed that there was an on-coming vehicle that prevented his entry into the street. At some point in time Mercer is reported to have seen three headlights in his rearview mirror which told him of the possibility of an impending danger. Mercer is also reported to have immediately moved his vehicle forward as soon as the third headlight could be seen in order to obtain a position on the roadway closer to the centerline thereby allowing as much room as possible to

the right of his vehicle for the passage of the oncoming cars. Seeing the headlights and recognizing the possibility of a danger would take Mercer about 1 second of time. Moving his vehicle forward 15 to 20 feet and stopping the vehicle would require about 3 seconds based on a reasonable acceleration and deceleration rate for the Mercer vehicle. Thus, the time to identify, react, and move the Mercer vehicle would take about 4 seconds.

Knowing that Thomas can see Mercer at a distance of 551.9 to 603.3 feet and Mercer can see Thomas' right headlight before Thomas can see Mercer's vehicle, one can determine when in the sequence of events the Mercer vehicle most likely moved relative to the position and time of the Thomas vehicle. Using the most conservative estimate of the time that Thomas can first see Mercer's vehicle (10.4 seconds) and subtracting from this time the most conservative estimate of the time for Mercer to identify that two cars were coming and then move his vehicle (4 seconds) results in a time of 6.4 seconds. Actually, this time is longer because Mercer can see the right headlight of the Thomas vehicle before Thomas who is sitting in the driver's seat and on the left side of the vehicle can see Mercer. I have estimated that the time should be extended by about 1 second to account for this effect. Using this estimate of time, it can be said that when the Thomas vehicle was 7.4 seconds from the impact point (379 feet from impact) the Mercer vehicle had made its maneuver to obtain a position closer to the roadway's center and was now stopped.

Because of time constraints and the fact that the roadway is curved at 398.1 feet from the impact point, I have not performed a full analytical solution to this problem. If this case moves forward, I will perform a graphical solution to this problem in the near future. For the graphical solution a scaled model will be made of the roadway and cars will be positioned on the roadway in accordance with the assumptions already stated in this report. This solution will most likely include a video to show how the Lumsden and Thomas cars are moving as the corner is rounded and as these two vehicles approach the Mercer vehicle. I am convinced that the solution to the problem will result in distances and times that are similar to what has been reported to date in this case.

Respectfully submitted,

s/ C. C. Richard
Clyde C. Richard, Ph. D., P. E.
Mechanical Engineer
January 15, 2003

[Mercer Automobile Accident Analysis by Dr. Clyde Richard, Complaint Exhibit #3, pages E21 - E27 in Joint Record Extract, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Brief of Appellant, pages 2, 5, 11, and referenced in Opinion, page 5 (See App. H above, pages App. 15 - App. 16), Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713]

APPENDIX AA

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

GREGORY SHAWN MERCER, Plaintiff

v. Case No. CAL03-02711

WILLIAM ALOYSIOUS THOMAS, III, Defendant

COMPLAINT EXHIBIT #4 (February 11, 2003)

Petitioner's COA Petition paragraph **H3**
(June 19, 1997)

[Complaint, Exhibit 4, Deposition of William Aloysious Thomas, III, pages 21-22, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Reply Brief of Appellant, page 4, Motion for Reconsideration, paragraph 5, page 3, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. Petition for Writ of Certiorari, paragraph H3, pages 6 - 7, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434 [E40 - E41]]:

"Q (Petitioner's attorney) - Did you appear and testify at any ticket hearing or criminal hearing resulting from this accident?

A (Respondent) - No, I did not.

Q - Did you give any person a recorded or written statement in connection with this accident, other than what we're doing today, obviously?

A - I had answered some interrogatories.

Q - Other than those interrogatories, which I'm sure counsel here helped you prepare, and which you answered, did you give a police officer a written statement? Did you speak with any insurance company and give them a written or recorded statement, or anything like that?

A - I know I didn't give the police officer a written statement. And as far as the insurance company, I honestly cannot remember if I did, but I would assume that I did.

Q - Do you recall ever speaking with any investigator that might have been investigating the accident, other than the police officer?

A - Other than the police officer, I don't remember speaking with anyone."

Petitioner's COA Petition paragraph **H8**
(Deposition June 19, 1997; Court January 15, 1998)
[Complaint, Exhibit 4, Deposition of William Aloysious Thomas, III, pages 14 (June 19, 1997) [E33, E60 - E61]]:

"MR. THOMAS: The entire time prior to the accident, the only thing that I saw was Mr. Mercer sitting still, or it

appeared that he was sitting still from where I was. And I could see that he had his left turn signal on, waiting to make a left turn. I didn't see anything else.

MR. VON DIEZELSKI: The entire time that you saw Mr. Mercer's vehicle before the accident, his vehicle was doing nothing – but it was doing nothing, other than being at a standstill; is that correct?

MR. THOMAS: That's the way it appeared to me.

MR. VON DIEZELSKI: To the best of your recollection, he had his left turn signal on?

MR. THOMAS: Yes."

Petitioner's COA Petition paragraph **H9**

(Deposition June 19, 1997; Court January 15, 1998) [Complaint, Exhibit 4, Deposition of William Aloysious Thomas, III, pages 29-31 (June 19, 1997) [E48 - E50, E66 - E67 (Last 3 questions & answers not in Court)]]:

"MR. VON DIEZELSKI: How long after the point that you last see Mr. Mercer's vehicle, how long after that did the accident happen?

MR. THOMAS: Within a matter of seconds.

MR. VON DIEZELSKI: That's a good answer. I don't want to put words in your mouth. Could you be a little

more specific? Was it more than five seconds, less than five seconds?

MR. THOMAS: It was definitely more than five seconds.

MR. VON DIEZELSKI: From the point in time that you last saw Mr. Mercer's vehicle to the point in time of the accident happening, to the best of your recollection, more than five seconds transpired?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: Would it have been more than 10 seconds; do you know?

MR. THOMAS: I think it would be fair that it was less than 30 seconds. So somewhere in between five and 30 seconds; exactly how much, I couldn't say.

MR. VON DIEZELSKI: I think I asked you this question before. How far back of Mr. Mercer's vehicle were you when you last saw his vehicle?

MR. THOMAS: I don't remember.

MR. VON DIEZELSKI: Was the thing that kept you from seeing Mr. Mercer's vehicle in that time span, between five and 30 seconds, somewhere between there, was it the van?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: Nothing other than the van blocked your view?

MR. THOMAS: Right."

Petitioner's COA Petition paragraph **H10**

(Deposition June 19, 1997; Court January 15, 1998) [Complaint, Exhibit 4, Deposition of William Aloysious Thomas, III, pages 19 (June 19, 1997) [E38 - E40, E62 - E63]]:

"MR. VON DIEZELSKI: Did you actually see the vehicle operated by Mr. Lumsden, the van, strike the vehicle operated by Mr. Mercer?

MR. THOMAS: No, I didn't see it strike him.

MR. VON DIEZELSKI: How do you know the vehicles collided?

MR. THOMAS: Heard it.

MR. VON DIEZELSKI: How far back from Mr. – how far back from the van were you when you heard the collision?

MR. THOMAS: I was right beside him. Well, yes, I would assume I was beside him. I remember the van was beside me, exactly right beside. I'm not sure if we were equal car lengths, but I know he was on my left-hand side.

MR. VON DIEZELSKI: At the point in time that you

heard the collision, your vehicle was still in the right lane?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: Is the van still in the left lane?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: You realize, at that point in time, at that intersection, the lanes are now going to begin to change from two to one lane; is that correct?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: Were you attempting to pass the van?

MR. THOMAS: What do you mean by "pass?"

MR. VON DIEZELSKI: Well, you're aware that the lanes are going from two lanes to one lane, correct?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: And you know that the van is right beside you just before the impact happens, correct?

MR. THOMAS: Yes.

MR. VON DIEZELSKI: At that point in time, are you trying to pass the van to get in front of him so that you're

leading him when the lanes go from two to one?

MR. THOMAS: Logically, I would be passing him, because he would have to wait for the car to turn. So I would be passing him.

MR. VON DIEZELSKI: Remember what I'm trying to do here. All I'm trying to do is find out what you actually remember. I don't want you to try to put things together like pieces of a puzzle. I really want what you remember. To the best of your recollection, you were trying to pass the van?

MR. THOMAS: Yes."

[Fraudulent Statements in Thomas' Deposition, Complaint Exhibit #4, Plaintiff's Motion to Alter or Amend a Judgment - Court Decision and Motion for a New Trial (Hearing), pages E117 - E121 in Joint Record Extract, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Brief of Appellant, pages 6 - 8, and 12 - 15, Joint Record Extract, pages E33 - E34, E38 - E41, E48 - E50, E 117, E120 - E121, E195 - E196, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. Extracted in Petition for Writ of Certiorari, paragraphs **H3** and **H8 - H10**, pages 6 - 11, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

APPENDIX BB

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

GREGORY SHAWN MERCER, Plaintiff

v. Case No. CAL03-02711

WILLIAM ALOYSIOUS THOMAS, III, Defendant

COMPLAINT EXHIBIT #5 (February 11, 2003)

(See Petition paragraphs **H8 - H10** - App. AA above)

[Fraudulent Deposition Statements in Thomas' Courtroom Testimony read to Jury during Plaintiff's Case-in-Chief, Complaint Exhibit #5, pages E60 - E62, E66 - E67 in Joint Record Extract, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711, January 15, 1998]

APPENDIX CC

INVESTIGATION FOR INCONSISTENT STATEMENT

Reply Brief of Appellant, Court of Special Appeals of Maryland, September Term 2004, No. 1713, page 1 (April 6, 2004):

"CORRECTIONS TO APPELLEE'S STATEMENT OF THE CASE ... Two very minor housekeeping errors in the Statement of the Case section are mentioned in the interest of thoroughness: **1)** Page 3, lines 2-3, 'found at ***E.183-204*** and R.83-84' should be 'found between R.83-84'; **2)** ..."

[E188 to E192 correspond to App. 103 to App 105 of this appendix where Petitioner's testified to the Trial Court at the 7/18/03 Motions Hearing.]

Reply Brief of Appellant, Court of Special Appeals of Maryland, September Term 2004, No. 1713, page 4 (April 6, 2004):

"Appellee's 6/19/97 deposition containing fraud informed appellant's attorney appellee 'assumed' he made a statement to GEICO [E41]."

[E41 corresponds to paragraph **H3** in App. AA above]

Petitioner's COA Petition paragraph **H3**
(June 19, 1997):
(See paragraph H3 in App. AA above)

Petitioner's COA Petition paragraph **H4**
(November 28, 1992):
Signed Advice of Rights and Waiver Form (November 28, 1992) [E107]:

> "Do you want to make a statement at this time without a lawyer? Yes WAT, III
>
> . . . . . .
>
> Signed (William A. Thomas, III)"

Petitioner's COA Petition paragraph **H5**
(September 12, 1996):
[Deposition of Corporal Joseph R. Dove, page 25 (September 12, 1996) [E108-E109]]:

"Q DO YOU HAVE NOTES OF YOUR INTERVIEW WITH LUMSDEN?

A NO, I DON'T HAVE ANY NOTES FROM THE INTERVIEW WITH HIM. I DO HAVE A FORM THAT WAS GIVEN TO HIM, ADVICE OF RIGHTS AND WAIVER FORM, WHERE OFFICER WELLER, 1881, ADVISED HIM OF HIS CONSTITUTIONAL RIGHTS,

AT WHICH TIME HE DECLINED TO GIVE ANY STATEMENT TO THE POLICE ABOUT THE INCIDENT.

Q WHAT ABOUT MR. THOMAS?

A MR. THOMAS, IF I REMEMBER CORRECTLY, HE WAS GIVEN THE SAME INFORMATION, ADVISED OF HIS RIGHTS, SAID HE WOULD GIVE A STATEMENT AT THAT TIME, WITHOUT A LAWYER PRESENT, AND THEN DECIDED NOT TO. THAT IS WHY I HAVE NO STATEMENT FROM HIM AS PART OF THE FILE."

Petition paragraph **H6** (June 8, 1993):
Transcript of State of Maryland v. Lumsden, Case M. V. M518193, cover page (June 8, 1993) [E110]:

"Statements of
GREGORY SHAWN MERCER
GORDON SHIPLEY
DENNIS MURPHY
JOAN MURPHY

BEFORE: JUDGE LEWIS"

Petition paragraph H7 (June 21, 1993):
GEICO Claim Denial Letter (June 21, 1993) [E111]:

"Dear (Petitioner's attorney):
Our obligation as an insurer is to pay all losses for which our policyholder is legally liable. In our desire to be fair in our decision, we are guided by all the information available to us, including reports from our insured, your client, and any witnesses acquainted with the facts."

[Investigation for Inconsistent Statement, Fraudulent Statements in Thomas' Deposition, Complaint Exhibit #4, page ***E41*** in Joint Record Extract, Amendment by Addition to Plaintiff's Response to: Defendant's Motion to Quash Service of Process Alternative Motion to Dismiss the Complaint and in the Alternative for Summary Judgment (Chronology of Events & Exhibits, pages ***E104 - E111*** in Joint Record Extract (discussed in 7/18/03 Hearing at ***E188 - E192***), Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Brief of Appellant, page 1, Brief of Appellee William Aloysious Thomas, III, pages 2 - 3, 7, 14, 21 - 22, **Reply Brief of Appellant, pages 1 - 4, Motion for Reconsideration, paragraphs 5 (*See paragraph H3 in App. AA' above*)**, 10 - 12, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. **Petition for Writ of Certiorari, paragraphs H3 - H7 (*See paragraph H3 in App. AA' above*), pages 6 - 8,** Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

APPENDIX DD

COMPLAINT DEFECT CORRECTIONS

Plaintiff's Response to: Defendant's Motion to Quash Service of Process Alternative Motion to Dismiss the Complaint and in the Alternative for Summary Judgment, paragraph 4
(April 25, 2003):

4. Prior to the trial in 1998, Plaintiff's accident reconstructionist, Greg Manning, was unable to conclude if Defendant was aware of Plaintiff's position of peril during any second visual opportunity without the signed statement. Mr. Manning surmised that Defendant may have been distracted from the road ahead (looking at his car radio, for instance). For a Last Clear Chance defense, the Defendant had to have been aware of Plaintiff's position of peril and had to have enough time to react to avoid Plaintiff's injuries. Plaintiff had no certain Last Clear Chance defense without the signed statement and his previous accident reconstructionist can not be faulted for missing an available Last Clear Chance analysis.

Petitioner's COA Petition paragraph **H2**
(April 25, 2003):

"6. [Respondent's] deposition testimony of June 19, 1997, which was presented to the jury on January 15, 1998, offers dates that are not controlling for the purposes of starting the clock on the statute of limitations. Courts and Judicial Proceedings § 5-203 stipulates the date the

limitations begins depends on the [petitioner's] access to information withheld by [respondent's] fraud which should notify [petitioner] he was wronged. It is incumbent on the [petitioner] to take action against the wrong within a three-year period in this type of tort action.

7. [Respondent's] present sense impression signed insurance statement evidence [Rules 5-802.1(a)(2) & 5-803(b)(1)] was the only notification [petitioner] received that [respondent's] deposition testimony was, in fact, false. Had [petitioner] had access to this evidence when [respondent] made diametrically opposite deposition testimony on the record, [petitioner] would have taken all measures available to expose the contradictions. The trial court's jury verdict was predicated upon the assumption that the [respondent's] deposition testimony was honest, as it was, after all, under oath. Consequently, because the [respondent's] testimonial contradictions were not revealed to [petitioner] until after battling [respondent's] insurance company in court to disclose [respondent's] signed statement and because it was not discoverable in the first trial, the date August 7, 2002, when the insurance company reluctantly provided this signed statement to [petitioner] [Motion to Alter or Amend, E127 - E128, E149 - E176], is the first moment when [petitioner] was aware of the contradictions. [Petitioner] had definite proof he had been forced to give up a Last Clear Chance defense to [respondent's] Contributory Negligence claim on January 15, 2003, with Dr. Clyde C. Richard's "Mercer Automobile Accident Analysis [Complaint Exhibit 3, E21 - E27]." The limitation period, therefore, should be deemed

to accrue on August 7, 2002, at the earliest, if not January 15, 2003. This Complaint [E8 - E15] was filed on February 11, 2003, so this action is not time barred."

[Complaint Defect Corrections, Plaintiff's Response to: Defendant's Motion to Quash Service of Process Alternative Motion to Dismiss the Complaint and in the Alternative for Summary Judgment, paragraphs 4, and 6 - 7, Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711. Appellant's Reply to Opposition of Appellee to Motion for Leave of Court for Amici to File Amicus Curiae Briefs, pages 2 - 4, Reply Brief of Appellant, pages 4 (***Appellant's investigation for statement***), 9 - 10, Motion for Reconsideration, paragraph 5, and Joint Record Extract, pages ***E41***, E97 - E98, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. Extracted in Petition for Writ of Certiorari, paragraph **H2**, page 5 - 6, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

APPENDIX EE

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

Case No. CAL 03-02711

GREGORY SHAWN MERCER, Plaintiff vs.

WILLIAM ALOYSIOUS THOMAS, III, Defendant

TRANSCRIPT OF PROCEEDINGS
(Hearing - Part 1)

Friday, July 18, 2003
Upper Marlboro, Maryland

BEFORE: The [sic. Honorable] WILLIAM B. SPELLBRING, JR., Associate Judge

APPEARANCES:
For the Plaintiff: PRO SE
For the defendant: WADE J. GALLAGHER, ESQ.

Excerpt from transcript pages 2 - 20 [Court of Special Appeals of Maryland Joint Record Extract - T2 - T20, E184 - E202]:

PROCEEDINGS

THE DEPUTY CLERK: CAL 03-02711, Mercer versus Thomas.

THE COURT: Okay. Mr. Gallagher, you've filed a motion to dismiss which includes, among other issues, the issue of limitations. Correct?

MR. GALLAGHER: Yes, Your Honor.

THE COURT: Okay.

MR. MERCER: Your Honor --

THE COURT: You're Mr. Mercer?

MR. MERCER: I am. And I have just a couple of things that --

THE COURT: You can do whatever you want after you've answered my question and that question is, why should I not dismiss this on limitations?

MR. MERCER: Well, I was kept ignorant of the statements that the defendant had made to his insurance company.

THE COURT: Were you unconscious in the accident?

MR. MERCER: I was in a coma, and I came out of the coma like five, six days later.

THE COURT: But you weren't in a coma and unconscious during your trial. Right?

MR. MERCER : No I wasn't. However, --

THE COURT: And you heard Mr. Thomas testify during the trial. Correct?

MR. MERCER: But I had no idea there was ever a statement and the statement and the deposition were directly conflicting each other.

THE COURT: So what?

MR. MERCER: Well, if I'm kept ignorant because of the Defendant Thomas' fraud, according to the Court's of Judicial Proceedings --

THE COURT: What was it that you relied on?

MR. MERCER: I relied on his deposition testimony which is not truthful.

THE COURT: You relied on it for what purpose?

MR. MERCER: He was saying I was contributorily negligent. And I was looking at the possible --

THE COURT: Why didn't you dismiss your lawsuit if you felt you were contributorily negligent?

MR. MERCER: I'm sorry?

THE COURT: If you felt, based on what he said, that you

were contributorily negligent, why didn't you dismiss your --

MR. MERCER: I did not feel I was contributorily negligent and I took it to the court with the opinion --

THE COURT: You didn't rely on his testimony?

MR. MERCER: Well, the point is that if he alleges that I was contributorily negligent I have two ways of defending that. I can say, no, I wasn't contributorily negligent --

THE COURT: What's the definition of fraud?

MR. MERCER: The definition of fraud is that he --

THE COURT: You relied on --

MR. MERCER: -- misrepresented --

THE COURT: -- to your detriment. What is it that you relied on?

MR. MERCER: Relied on the testimony he gave, which was not truthful.

THE COURT: Are you relying on it for what purpose?

MR. MERCER: For -- There's two defenses I had; one, was to say that I was not contributorily negligent, other one is that if I was contributorily negligent, even if I was

contributorily negligent, I have last minute chance defense.

Now, I was not able to formulate the last minute chance defense because his deposition testimony basically said that he didn't -- he was not aware of my car during the secondary phase of last minute chance, and that's an essential element to last minute chance.

THE COURT: Your first count into this is the count of perjury.

MR. MERCER: That's correct.

THE COURT: What authority do you have that that is a civil cause of action?

MR. MERCER: I was told that perjury can either go criminal or civil. If it's only involving a civil matter, then he lied, in any civil matter not a criminal matter and, therefore, the perjury was limited to the civil, it affected only me. That's --

THE COURT: Okay, Mr. Mercer, tell me anything else you'd like to tell me.

MR. MERCER: Okay. First of all, a few preliminary matters.

The defense counsel states in his first paragraph he's appearing for the purpose of this motion and no other reason.

Plaintiff respectfully asks the Court to rule who will be defense counsel after today's hearing. Will I be required

to serve papers to Mr. Gallagher or Mr. Thomas in Connecticut? Plaintiff is very confused about this point.

Second matter is that in defense motion there's two cases where he has confused Defendant Thomas with Defendant Mercer. Obviously, I was a plaintiff in both cases.

If you look at page three, number four, paragraph number four, the third line down -- Are you there?

THE COURT: I'm listening to you.

MR. MERCER: Basically, he just makes -- Then I filed that other document to help me discuss things. It gives chronology of events specifically concerning his statement. If you were to look at that chronology you'd see that the accident happened on 11-28. There are some exhibits that indicate there was a statement given by Gordon Shipley at the accident scene, mentions nothing from Mr. Thomas, it's just trying to establish the date of the statement.

Mr. Thomas gave an Advise of Rights and Waiver Form. He stated that he would make a present sense impression statement but, however, the police officer investigating the accident, Corporal Dove, did not receive this present sense impression statement.

He also -- the officer filled out a State of Maryland Motor Vehicle Accident Statement, didn't say anything about a statement from Mr. Thomas.

The transcript of Mr. Lumsden -- statement from Mr. Lumsden against Mr. Thomas did not appear -- did not make a statement.

Then, on the Exhibit Number 6, here is a letter from

GEICO. Here they have paid out to Thomas's' claim and they state that including reports from our insured -- our desire we're guided by all the information available to us including reports from our insured. At that point, there had not been any statement or report or anything from Mr. Thomas in the case. And, so, based on that, I can conclude that the statement was made shortly after the accident but certainly before June 21st, of 1993.

Now then the chronology shows that this -- the statement was made before June 21, 1993. The deposition was made on June 19, 1997. The statement is closer to the event, it's much more truthful and he had no reason to lie, there was no litigation against him in the statement. However in the deposition there was a case pending against him and it is shown to be more likely that it's not, as the present sense statement was made closer to the event, it would be more correct.

Now, then, as far as the defense's issue on the service process --

MR. GALLAGHER: Your Honor, that's withdrawn.

THE COURT: Don't have to address it. He withdraws it.

MR. MERCER: Okay. Now, I tried to do discovery in this case and defense counsel has said, he wanted these preliminary matters settled. I guess that wasn't an issue.

Now then as far the Court's and Judicial Proceedings -- Give me a second.

Court's and Judicial Proceedings Section 5-203, ignorance of a cause of action produced by fraud. If the

knowledge of a cause of action is kept from a party by the fraud of an adverse party, the defendant, the cause of action shall be deemed to accrue at the time when the party discovered or by exercising of ordinary diligence should have discovered the fraud.

If you look at the chronology, you'd see that I stated on the 28th of November that he was going to give a present sense statement; however, the officer investigating the accident never received a present sense of impression statement. And I never was aware that there was a present sense impression statement until August 7th, on the second page of what I filed on August 7th, 2002. That's the first time I have ever seen a statement by Mr. Thomas that gives me the truth.

And that's when I had the ability to start investigating. If I had a last minute chance to argue.

Now, on January 15th, of 2003, by an accident reconstructionist concluded that he -- based on the statement that he uncovered, Thomas was aware during the secondary negligence that I was in a condition of peril, but it only arises when I'm --

THE COURT: If I were to permit this law suit to go forward, when would cases ever end?

MR. MERCER: Your Honor, this will show that I have been very diligent in pursuing the truth.

THE COURT: Answer my question. When would cases ever end? Why couldn't they lose in any law suit, simply sue, again claiming perjury, rape, sue, and if they lost that

one, they would sue again?

MR. MERCER: This is a court of law, Your Honor. In this court of law, people take oaths. The oath is to present the truth to the jury.

THE COURT: You still haven't answered my question.

MR. MERCER: Well, the reason why is because I have never had a fair trial. I have been presented with --

THE COURT: I didn't ask you why. I said when would cases end? When would they ever end?

MR. MERCER: When the truth comes out.

THE COURT: According to whom?

MR. MERCER: What's that?

THE COURT: The truth according to whom? Subjective or objective truth?

MR. MERCER: Well, even from their voice, the subjective. He has two contradicting statements. He has a statement made closer to the accident in time that's much more likely to have been more truthful, and in deposition he directly contradicts that.

Now, based on that I have the right -- I mean, that was evidence. That was evidence of -- According to the Maryland rules, it was a present sense impression

statement that was signed and it was in writing.

Now, that evidence can't be erased. Now where it was privileged that the insurance company had it -- they had to insure that the deposition testimony is consistent with that. If their deposition testimony of their client is not consistent with that when it's presented in court, they have an obligation to say, look, we object, it might be fraudulent, it may not be true. They have a right, they have a duty to object.

And if you look in the Rules of Professional Conduct it says that a lawyer shall not allow their client to commit fraud in the service of that attorney. And by keeping silent when these things were said before the jury --

THE COURT: Is the party a party to that lawsuit?

MR. MERCER: Your Honor, --

THE COURT: Is that the next law suit?

MR. MERCER: No , Your Honor. If the attorney does -- or if the guy does --

THE COURT: What difference does that make whether the attorney for GEICO is a party to their lawsuit?

MR. MERCER: Well this, lawsuit is against Mr. Thomas.

THE COURT: Exactly.

MR. MERCER: I'm looking to do discovery. If I finish my discovery, I might amend my complaint so that I add other parties.

THE COURT: No question in my mind.

MR. MERCER: GEICO and Mr. Chevernak, I might consider adding those, but I need to start discovery. I asked Mr. Gallagher if he would allow me to start discovery. He said no, not until the preliminary motions are handled.

Now, I'd like to move forward on discovery but he's preventing me from doing that based on his preliminary matters and now he's thrown out one of the preliminary motions that he doesn't really feel is an issue anymore.

THE COURT: That he what?

MR. MERCER: He's decided not to deal with, one of these preliminary motions why we're here, he's delayed an answer.

THE COURT: Isn't that sort of like hitting a grand slam homerun in the middle of the ninth and you're one run behind? What difference does it make after the first two runs are across the plate?

MR. MERCER: Your Honor, this is a court of law. The truth -- I would like the jury to hear the truth and judge me fairly. I don't feel that that has been done.

The deposition testimony and the statement are so conflicting and the deposition testimony is -- it's almost

designed to take away my right to the last minute chance defense. That's my objection. And fair dealing is part of what we do here. And, so, therefore, I would like the opportunity to present my case fairly. And I can't do that if Defendant Thomas is giving me falsehoods and I'm relying on them to my detriment.

THE COURT: And you relied on it -- Remind me again how you relied on it.

MR. MERCER: I looked at the -- I had two ways of defending myself. A, I was not contributorily negligent. Now, I did that and the jury said they felt that I might have done something else; however, there's another way I could defend and that is if I was contributorily negligent, then the defendant had the last clear chance to avoid this injury.

THE COURT: Did you try this case pro se?

MR. MERCER: No, I did not.

THE COURT: You had an attorney try it?

MR. MERCER: I had an attorney, and he looked at it and did not feel there was evidence, my attorney and I both looked at the evidence and he did not feel we had enough information for a last minute chance defense. And if you look at the specifics here -- I could read this. Let me tell you exactly how it was taken away.

This is in regards to the defense motion where he says -- Dr. Richard, then, in 2003, instead of Mr. Manning

five years ago, and that is because the statement reached an accident reconstructionist and they could finally complete last minute chance calculations, that is -- an element of that defense is that the defendant was aware of the plaintiff's position of peril during the secondary negligence phase after the van no longer blocked defendant's view of plaintiff. But the defendant was only aware of the plaintiff --

THE COURT: According to the defendant --

MR. MERCER: According to the defendant's deposition.

The defendant stated in his deposition, did you see both Mr. Mercer's vehicle and Mr. Lumsden's van prior to the accident. At one point, yes, I did. Let's concentrate on Mr. Mercer's vehicle first. Tell me what -- Tell me what you saw Mr. Mercer's vehicle do the entire time prior to the accident. The entire time prior to the accident, the only thing that I saw was Mr. Mercer sitting still, or it appeared that he was sitting still. And I could see that he had his left turn signal on, waiting to make a left turn. I didn't see anything else.

That's important. He saw me sitting still with my turn signal on, waiting to make a left turn. He didn't see anything else.

The entire time that you saw Mr. Mercer's vehicle before the accident, his vehicle was doing nothing but -- it was doing nothing other than being at a standstill. Is that correct. That's the way it appeared to me. To the best of your recollection, he had his left turn signal on? Yes.

Now, then, we look at the plaintiff was not moving

with the single lane oncoming traffic. Gordon Shipley saw plaintiff's very dramatic movement. This is in the transcript. Now, the defendant didn't see me moving but the oncoming traffic, -- This is what he saw.

Would you just go ahead and describe for the ladies and gentlemen of the jury how the accident happened? Well, I was traveling westbound on Good Luck Road toward Trexler, T-R-E-X-L-E-R. I was about a hundred feet from the intersection and Mr. Mercer went to turn left on Trexler. He committed his left wheel, what would have been over the center line and evidently he couldn't make it. So, then, he cut back into traffic. And there was a van beside him and beside of the van was another Honda. They were like, in my opinion -- in my opinion, they were playing cat and mouse, trying to get ahead of each other. Mr. Chevernak objects. The court sustained the objection as to his objection. The witness -- It was like -- The Court, sustain the objection as to his opinion. He can testify as to what he observed but you can't offer an opinion, sir. Okay. So the jury will disregard that. The witness; okay. There was two lanes -- I'm sorry. I need to stop at six.

Shipley continues on page 143. So, I did move. Now, what about my signal? This is what Shipley says. Now, you indicated that when you first saw Mr. Mercer make this -- commit to his left turn he had a left turn signal on. Right. What happened to his turn signal when he turned back to the right, as you described it? I didn't see it any more, so I suppose it cut itself off when he cut his -- corrected his wheel.

So, he, Mr. Thomas, the defendant, saw me at a standstill with my turn signal on. Thereafter, I make a very

dramatic movement and my signal cancels. Mr. Thomas isn't seeing me when my signal is off. After this is the secondary negligence stage. Mr. Thomas' deposition states that he did not see me during the secondary negligence stage. Don't have that is aware of me during the secondary negligence stage. But if you look at this statement, he states not that I wasn't moving but that I was virtually motionless. So, he did see some movement.

The accident reconstructionist reconstructed the accident and says during the secondary negligence phase he caught just a glimpse of me.

Now, primary and secondary negligence cannot be concurrent. The Court of Appeals has stated that those two things must not be concurrent. So, that they can establish that the defendant firmly made the original mistake.

If Mr. Thomas sees me starting to make a turn and decides to start passing Mr. Lumsden, L-U-M-S-D-E-N, then, who made the original mistake? He could have thought, well, he could be out of the way when -- by the time I got there, but not if the primary and secondary negligence are not concurrent. Then it's very clear Mr. Thomas was the original -- made the original mistake which is he saw me in front of a special danger with respect to other traffic. I think it's TA 21-801(h).

Now, thereafter, he catches me in just a -- in a little bit of movement and I stop. Now, that's my secondary negligence phase. That's a very crucial element. I need him to be aware that I'm in a position of peril. If he saw me moving, if he says in his deposition he didn't see me move, but then in the statement he says I saw a little movement and I don't understand why Mr. Lumsden didn't slow

down and stop, that was the element I did not have because I relied on the deposition.

Now, that deposition was not consistent with the statement. And that statement gives me a secondary negligence and a last clear chance defense, in which case I would have gone to court in the previous trial and I would argue --

THE COURT: Hindsight is always 20/20.

MR. MERCER: Well, Your Honor, I didn't have the statement. I never knew it existed until --

THE COURT: If I hadn't lost I would have tried it a different way and then I would have been successful.

MR. MERCER: Your Honor, -- Your Honor, that's not fair because I didn't have all the evidence. I have deduced as of August 7th, 2002, that the deposition testimony which I relied on was not the truth. I did not have a fair trial.

THE COURT: Mr. Mercer, I'm enjoying this and I'm sure you're, too. I have to bring everything to an end. How much longer will you be?

MR. MERCER: I can read the jury instructions on fraud. You asked me what they were and basically I'm just paraphrasing them.

THE COURT: The Appellate Court also takes judicial notice that the trial courts understand the law. You don't

have to instruct me on the law.

MR. MERCER: My cause of action here is perjury and fraud, and at one point in his complaint he says, well, the trial court can just strike the judgment that was perjurous, but now the problem is that now there is fraud, and this is not going to be created if they strike down the judgment. A new action is necessitated to address the fraud, and they can't create fraud by striking it out. Taking out the perjurous testimony is a fraud. And if we look at -- I'm almost done, sir, Your Honor -- Points of Authority as far as the privilege --

THE COURT: It's not raised. I'm not ruling on that.

MR. MERCER: Okay. I just have, then, a couple more things I need to read and I'm done.

This is directly out of the complaint, paragraphs 8 through 10. Plaintiff's claim is not limited to perjury. Paragraphs 27 through 30 appear in the section titled Count 2 - Fraud. Paragraphs 29 and 30 state the cause of action, fraud. Paragraph 29 gives defendant's intentional deception while paragraph 30 gives the lawful right this intentional deception caused plaintiff to give up -- Paragraph 29 states, defendant's intent was to mislead plaintiff for the purpose of avoiding liability for defendant's negligent behavior.

Paragraph 30, plaintiff was barred from recovery because of having been found contributorily negligent, but had it not been for defendant's lies while under oath, plaintiff would have been able to have constructed a

successful last clear chance argument.

According to Black's Law Dictionary 6th edition, 1999, fraud is defined an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right.

Paragraph 30 of the complaint gives the lawful right, last clear chance argument to contributory negligence claim, plaintiff was forced to give up due to defendant's deception by perjury.

THE COURT: How much longer, Mr. Mercer? I've got a bunch of lawyers I've got to get through.

MR. MERCER: One sentence.

THE COURT: Okay. I'm going to take these other lawyers. You stay right there, stay prepared. I don't want to miss anything.

(Whereupon, the Court took up other matters on the docket; reconvening as follows:)

Continued in App. A (Hearing - Part 2)

[July 18, 2003 Hearing Transcript prior to Appendix A, pages E183 - E202 (line 7), Mercer v. Thomas, Circuit Court for Prince George's County, Maryland, Case No. CAL 03-02711]

APPENDIX FF

FEDERAL QUESTIONS
MOTION FOR RECONSIDERATION
COURT OF SPECIAL APPEALS

Petitioner'S COA Petition paragraph **H12**
(August 24, 2004)

"24. "Sitting still" requires continuous view of an object that is not moving. "Virtually motionless" requires a minimum of two views of object in slightly different locations. Appellant's motionless vehicle had moved [Complaint Exhibit 4, E33; Motion to Alter or Amend, E121 - E125, E141 - E147] after appellee's line of sight to appellant's vehicle had been obstructed by the Lumsden van [Complaint Exhibit 4, E48 - E50; Motion to Alter or Amend, E120 - E121]. Therefore, appellee had to have seen appellant's previously motionless vehicle at a slightly different location after appellant's alleged Contributory Negligence period had begun and during Appellee's Secondary Negligence period [Complaint Exhibit 5, E73; Amendment to Motion to Alter or Amend, E177 - E182]."

Petitioner's COA Petition paragraph **H13**
(August 24, 2004)

"10. The significance of whether or not appellee had actual notice of appellant in a situation of peril during the Secondary Negligence period is essential to establish the level of the appellee's culpability in the November 28,

1992 motor vehicle accident [Motion to Alter or Amend, E114 - E115]. There are two radically different scenarios:

> Possibility A) with no actual notice, where appellee didn't see appellant's vehicle again after Lumsden's van no longer obstructed appellee's line of sight, appellant possibly still in upcoming intersection or appellant may have turned left out of upcoming intersection, appellee evasive action may or may not be required to avoid injury to appellant. Meanwhile appellee has become distracted by the radio, the back seat, etc. (An understandable mistake).
>
> Possibility B) with actual notice, where appellee actually saw appellant's vehicle again after Lumsden's van no longer obstructed appellee's line of sight, and appellee saw that appellant was clearly in upcoming intersection and in a perilous situation. Despite the danger to appellant's person, appellee made a conscious decision to pass the Lumsden van in order to be leading after the upcoming merge, that appellee displayed a wanton disregard for the safety of appellant's person, and engaged in willful negligent or reckless driving which left appellant comatose for 5 to 6 days and caused appellant permanent neurological injury inclusive of an epileptic condition. (Secondary Negligence of a Last Clear Chance argument)."

Petitioner's COA Petition paragraph **H14**
(August 24, 2004)

"30. Moreover, to deny without good cause, appellant's desire for a preserved jury trial [E15] is a violation of appellant's Maryland Constitutional rights (Maryland Constitution, Declaration of Rights, Article 5, Section b) and United States Constitutional rights (United States Constitution, Amendment 7).

31. Additionally, where a Last Clear Chance defense to a Contributory Negligent accusation was used successfully in Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983) [Motion to Alter or Amend, E131], by equality of rights under the law and equal protection of the law, to prevent appellant the opportunity to argue an available Last Clear Chance defense at a future jury trial without good cause is a violation of appellant's Maryland Constitutional rights (Maryland Constitution, Declaration of Rights, Article 46) and United States Constitutional rights (United States Constitution, Amendment 14)."

[Significance of Appellee Fraud and Federal Questions, Appellant's Motion for Reconsideration, paragraphs 10, 24, 30, and 31, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. Petition for Writ of Certiorari, paragraphs **H12 - H14**, pages 11 - 13, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

APPENDIX GG

Petitioner's COA Petition paragraph **H22**
(March 2, 2004)

"The Maryland General Assembly has looked at Contributory Negligence with Proportioning of Damages, Comparative Fault, and/or Comparative Negligence for 38 years [without passage and has not sponsored a bill in the last two years]:

1966	SB 111	SEN - 1/27 - unf. rpt.
1967	HB 277	HSE - 2/8 - unf. rpt.
1968	HB 58	HSE - 1/22 - unf. rpt.
1969	HB 63	HSE - 1/15 - 3rg. failed
1970	SB 116	SEN - 12/15/69 - unf. rpt. jpr.
1971	HB 546	HSE - 2/12 - unf. rpt. jud.
1972	HB 156	HSE - 1/12 - unf. rpt. jud.
1973	HB 785	HSE - 2/14 - unf. rpt. jud.
1974		
1975	HB 405	HSE - 1/27 - unf. rpt. jud.
1976	SB 106	SEN - 1/14 - 1rg. jpr.
1977	HB 2004	HSE - 4/4 - rpt. unf.
1978		
1979	HB1386	HSE - 3/29 - unf. rpt.
1980	HB 98	HSE - 3/25 - unf. rpt.
1981	HB 633	HSE - 3/26 - unf. rpt.
1982	SB 1007	SEN - 2/24 - 1rg. jpr., hrg 3/17
1983		
1984	SB 12	HSE - 4/7 - rpt. unf.
1985	SB 21	HSE - 4/6 - 3rg. failed
1986	SB 589	HSE - 4/4 - unf. rpt.

1987	HB 1198	HSE - 3/30 - unf. jud.
	SB 218	HSE - 3/30 - unf. jud.
1988	HB 1314	HSE - 3/22 - unf. jud.
	SB 232	HSE - 4/8 - unf. jud.
1989		
1990	HB 1013	HSE - 3/22 - unf. jud.
1991		
1992		
1993	HB 1094	HSE - 3/8 - wdr. jud.
	SB 266	SEN - 3/9 - unf. jpr.
1994		
1995		
1996	HB 836	HSE - 3/11 - wdr. jud.
1997	HB 846	HSE - 3/17 - unf. jud.
1998	SB 618	SEN - 3/27 - unf. jpr.
1999	HB 551	HSE - 3/22 - unf. jud.
2000	SB 779	SEN - 3/7 - unf. jpr.
2001	SB 483	SEN - 3/22 - unf. jpr.
2002	SB 872	SEN - 2/25 - 1rg. sru.
2003		
2004"		

Reply to Respondent's Answer to Petition
for Writ of Certiorari paragraph 3
(November 15, 2004)

3. To be consistent with Harrison, et al. v. Montgomery Board of Education, et al., 295 Md. 442, **462**, 456 A.2d 894, **904** (1983), the house bills listed in Petition paragraph **H22** should be corrected and added as follows: 1968 should be **HB 158** and **not HB 58**; 1970 should also

include **HB 452** and **HB 453**; 1974 should include **HB 556**; 1976 should also include **HB 377**; 1979 should also include **HB 1381**; and 1980 should also include **HB 1484**.

[38 years of Maryland Session Laws, referred to in Brief of Appellant, page 26, and listed in Appellant's Reply to Opposition of Appellee to Motion for Leave of Court for Amici to File Amicus Curiae Briefs, pages 9 - 11, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No. 1713. Petition for Writ of Certiorari, paragraph **H22,** pages 14 - 16, and Reply to Respondent's Answer to Petition for Writ of Certiorari, paragraph 3, page 1, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

APPENDIX HH

Petitioner's COA Petition paragraph **H23**
(May 11, 2004)
"COMPARATIVE NEGLIGENCE STATE LISTS [**Bold** entries are errors in Brief of Appellant]:

I. "Pure" Type Comparative Negligence:
Alaska (1975 - Kaatz v. State, 540 P.2d 1037)
Arizona (1984 - Session Law, Chapter 237)
California (1975 - Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858, 78 A.L.R.3d 393)
Florida (1973 - Hoffman v. Jones, 280 So.2d 431, 78 A.L.R.3d 321)
Kentucky (1984 - Hilen v. Hays, 673 S.W.2d 713)
Louisiana (**1979** - Session Law, Act 431)
Michigan (1979 - Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511)
Mississippi (1910 - Session Law, Chapter 135)
Missouri (1983 - Gustafson v. Brenda, 661 S.W.2d 11) ["pure" extended to products liability claims by 1987 H. B. 700]
New Mexico (**1981** - Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234)
New York (1975 - Session Law, Chapter 69)
Rhode Island (1971 - Session Law, Chapter 206)
Washington State (**1973** - Session Law, Chapter 138)

II. "50%" Type Comparative Negligence:
Connecticut (**1972** - Session Law, Act 273)

Delaware (1984 - Session Law, Chapter 384)
Hawaii (1969 - "49%" by 1969 Session Law Act 227, "50%" by 1975 Session Law Act 152)
Illinois (1981 - "Pure" by 1981 Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill. Dec. 23, "50%" by 1986 Session Law P. A. 84-1431)
Indiana (**1983** - Session Law, P. L. 317)
Iowa (1982 - "Pure" by 1982 Goetzman v. Wichern, 327 N.W.2d 742, "50%" by 1984 Session Law Chapter 1293)
Massachusetts (**1969** - "49%" by 1969 Session Law Chapter 761, "50%" by 1973 Session Law Chapter 1123)
Minnesota (1969 - "49%" by 1969 Session Law Chapter 624, "50%" by 1978 Session Law Chapter 738)
Montana (1975 - Session Law, Chapter 60)
Nevada (1973 - Session Law, Chapter 787)
New Hampshire (1969 - Session Law, Chapter 225)
New Jersey (1973 - Session Law, Chapter 146)
Ohio (1980 - Session Law, 38 v S 165)
Oklahoma (1973 - "49%" by 1973 Session Law Chapter 30, "50%" by 1979 Session Law Chapter 38)
Oregon (1971 - "49%" by 1971 Session Law Chapter 668, "50%" by 1975 Session Law Chapter 599)
Pennsylvania (**1976** - Session Law, P. L. 855, No. 152)
South Carolina (**1974** - "50%" for motor vehicles by 1974 Session Law No. 1177, "50%" generally by 1991 Nelson v. Concrete Supply Co., 303 S. C. 243, 399 S.E.2d 783)
Texas (1973 - Session Law, Chapter 28)
Vermont (1970 - Session Law, No. 234, Adj. Session)
Wisconsin (**1931** - "49%" by 1931 Session Law Chapter 242, "50%" by 1971 Session Law Chapter 47)
Wyoming (**1973** - "49%" by 1973 Session Law Chapter

28, "50%" by 1986 Session Law Chapter 24)

III. "49%" Type Comparative Negligence:
Arkansas (**1955** - "Pure" by 1955 Session Law Act 191, "49%" by 1957 Session Law Act 296)
Colorado (**1971** - Session Law, Chapter 125)
Idaho (1971 - Session Law, Chapter 186)
Kansas (1974 - Session Law, Chapter 239)
Maine (1965 - Session Law, Chapter 424)
North Dakota (1973 - Session Law, Chapter 78)
Tennessee (**1992** - McIntyre v. Balentine, 833 S.W.2d 52)
Utah (**1973** - Session Law, Chapter 209)
West Virginia (1979 - Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879)

IV. Common law Contributory Negligence:
Alabama Maryland Virginia
District of Columbia North Carolina

V. Comparative Negligence Slight Gross Rule:
Nebraska (**1913** - Session Law, Chapter 124)
South Dakota (**1941** - Session Law, Chapter 160)

VI. "Unique" Type Comparative Negligence:
Georgia (1861 - Georgia Code, §2914)"

[Common and Statutory Negligence Laws by State, Appellant's Brief, pages 25 - 26, and the purpose of Maryland Rule 8-414 Motion (Correction of Record) and Motion for Costs, pages 3 - 7, Mercer v. Thomas, Court of Special Appeals of Maryland, September Term 2003, No.

1713. Petition for Writ of Certiorari, paragraph **H23**, pages 16 - 18, Mercer v. Thomas, Court of Appeals of Maryland, September Term 2004, Petition No. 434]

(3)

No. 04-1676

Supreme Court, U.S.
FILED
JUL 12 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

GREGORY SHAWN MERCER,

Petitioner,

v.

WILLIAM ALOYSIOUS THOMAS, III, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Special Appeals Of Maryland

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Respondent Baltimore Gas and Electric Company is a wholly-owned subsidiary of Constellation Energy Group, Inc. ("Constellation Energy"). Constellation Energy, the parent Company and BGE Capital Trust II, a Constellation Energy affiliate, are the only publicly-traded companies.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baltimore Gas and Electric Company ("BGE"), in response to the Petition for Writ of Certiorari filed by Robert B. Campbell, Jr.[1], states:

1. This case originated on November 11, 1987 when Robert Campbell filed a Complaint against BGE and others seeking damages for personal injury suffered in a tragic electric contact accident on April 7, 1986. Mr. Campbell was seriously injured when a ladder he was using came in contact with a high-voltage overhead BGE wire. The matter was ultimately heard before a jury in the Circuit Court for Baltimore City, Maryland in December 1991. Immediately after a verdict for $4,850,000 was entered in favor of the Plaintiff, the trial judge granted BGE's Motion for Judgment Notwithstanding the Verdict on the ground that Plaintiff was contributorily negligent as a matter of law.

2. In December 1991, an appeal was noted to the Maryland Court of Special Appeals. The issues before the court at that time involved contributory and comparative negligence, and assumption of the risk.

3. The Maryland Court of Special Appeals affirmed the judgment in 1993. *Campbell v. Baltimore Gas and Electric Company*, 95 Md. App. 86, 619 A.2d 213 (1993). A Petition for Writ of Certiorari was filed in the Maryland

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[1] While this matter has been docketed as *Mercer v. Thomas, et al.*, there are two separate cases under consideration. Respondent BGE is only a party to the case of *Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company* and is not a party to the case of *Gregory Shawn Mercer v. William Aloysious Thomas, III.*

Court of Appeals and denied. *Campbell v. Baltimore Gas and Electric Company*, 331 Md. 196, 627 A.2d 538 (1993).

4. The matter was closed until August 24, 2004, when, eleven years after the denial of the Petition for Writ of Certiorari, Petitioner filed a *pro se* motion in the Maryland Circuit Court for Baltimore City seeking revision of the enrolled judgment of the Circuit Court for Baltimore City and the Court of Special Appeals, asking the court to reinstate the $4.8 Million jury award. As grounds for his motion, Petitioner raised the issues cited in his Petition for Writ of Certiorari to this Court. In response, BGE argued that there was no mistake or irregularity of the type required by Maryland Rule 2-535(b) to support revision of the judgment. Maryland Rule 2-535(b) provides, in pertinent part, that "on motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity."

5. The Circuit Court for Baltimore City, Maryland denied the Motion to Revise on September 17, 2004. Petitioner appealed the denial of the Motion to the Maryland Court of Special Appeals. Before his appeal was heard in that court, Petitioner filed a Petition for Writ of Certiorari in the Maryland Court of Appeals, which was denied on December 23, 2004. Petitioner never filed a brief in the Maryland Court of Special Appeals, and his appeal was dismissed on April 13, 2005. Petitioner is now seeking review by this Court.

6. Review on a writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10. A petition for a writ of certiorari will be granted only for compelling reasons. Sup. Ct. R. 10. Review may be allowed if a state court of last resort has decided an important federal

question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10. Review may be allowed if a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10.

7. The ruling of the Circuit Court for Baltimore City, Maryland on the Motion to Revise does not decide any federal question. Petitioner has failed to articulate a compelling reason for this Court to exercise its discretion to review.

8. A petition for a writ of certiorari should be stated briefly and in plain terms. Sup. Ct. R. 14. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to a ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition. Sup. Ct. R. 14.

9. The Petition lacks the succinctness and clearness sufficient to educate this Court of the points requiring consideration.

WHEREFORE, Respondent BGE requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 22 2005
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(5)

No. 04 - 1676

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER,

Petitioner,

V.

WILLIAM ALOYSIOUS THOMAS, III, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

SUPPLEMENTAL BRIEF

REPLY TO BRIEF IN OPPOSITION

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An intervenor should be permitted to intervene for Respondent Campbell as he has not filed a Petition or Conditional Cross-Petition. Case law exists for this situation: Hunter v. Ohio ex rel. Miller, 396 U. S. 879 (1969). Below, and as Petitioner's Reply to BG&E's Brief in Opposition (paragraphs #8 and #9), Petitioner clarifies what the intervenor Petition might state.

REPLY QUESTIONS PRESENTED FOR REVIEW*

6. Whether or not Maryland's contributory negligence common law was used to violate Campbell's 7th U. S. Amendment right to preservation of a jury trial *and Campbell's 14th U. S. Amendment right to due process / equal protection of the law*.

7. Whether or not any (including Maryland's *and West Virginia's*) common law of contributory negligence is unconstitutional.

* - Additions to questions #6 and #7 above (in *italics*) are explained below (See page RB-2 and RB-10).

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Davis v. Dipino et al., 337 Md. 642,
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Furguson v. Cramer,116 Md. App. 99, 103;
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Scott v. Rizzo, 96 N.M. 682,
634 P.2d 1234 (1981) SB-4 & App. 114

I. SUPPLEMENTAL BRIEF

A. On June 2, 2005, Petitioner filed a Motion for Clarification / Motion for Certification that Federal Questions were Raised and Decided in the Court of Appeals of Maryland (hereafter "COA"), Gregory Shawn Mercer v. William Aloysious Thomas, III, September Term 2004, Petition Docket No. 434. This document was denied without further explanation on July 18, 2005. The issue of Petitioner's elected trial by jury that was denied by the Circuit Court for Prince George's County was clearly before the COA. For whatever reason that the COA considered itself justified in denying Petitioner's jury trial, this federal question was raised and decided by the COA. This federal question deserved to be certified. Petitioner re-emphasizes his first question presented for review to this Court: Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence.

B. After a week to review his Petition filed June 13, 2005, Petitioner became aware of corrections or improvements that should be made to his Petition. A list of 16 corrections or improvements were mailed to each Respondent on June 21, 2005. Each Respondent received this list on June 22, 2005. The 16 corrections or improvements follow:

1) In the Table of Contents for both the Petition and the Appendices:

App. I should be dated October 12, 2004.
App. U should be dated November 3, 2004.

2) "169" is erroneous in the cite for Campbell v. BG&E, 331 Md. 196, 627 A.2d 538 (1993) on pages vi, ix, and App. 47.

3) In the Table of Authorities, page x, Harrison et al. v. Motgomery Board of Education et al. also appears on App. 112 and as Campbell's COA Petition paragraph H32.

4) In Constitutional and Statutory Provisions Involved, page 2, U. S. Constitutional Amendments are not given verbatim in any Maryland Court but referred to in the COSA and COA. See Petitioner's COA Petition paragraph H14 (App. FF at App. 110).

5) Petition, page 9, "(App. DD at paragraphs 6 & 7)" should be "(App. DD at paragraphs 6 & 7 or H2)".

6) Petition, pages 10, 22, and 23, Davis v. Dipino appears in Petitioner's COA Petition as paragraph H24.

7) In the Statement of Cases, Campbell v. BG&E, pages 16 - 19, it would be significant to mention that Campbell's attorney presented the Last Clear Chance defense to the CC judge while the jury was not present. The jury recognized the Last Clear Chance defense while the judge, despite Campbell's attorney's presentation, either missed or ignored the significance of the defense. Campbell's attorney's presentation of the Last Clear Chance defense

appears as Campbell's COA Petition paragraph **H18**.

8) Petition, pages 17, 18, and 24, Cohen v. Rubin appears as Petitioner's COA Petition paragraph **H28** and Campbell's COA Petition paragraph **H33**.

9) Petition, page 21, the first two sentences should be combined with a comma to eliminate a sentence fragment.

10) Petition, page 22, Furguson v. Cramer appears as Petitioner's COA Petition paragraph **H25**.

11) App. GG, page App. 113, "[38 years ..." should be "[39 years ..."

12) App. HH has the following case law in alphabetical order:

Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill. Dec. 23 (1981)
Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979)
Goetzman v. Wichern, 327 N.W.2d 742 (1982)
Gustafson v. Brenda, 661 S.W.2d 11 (1983)
Hilen v. Hays, 673 S.W.2d 713 (1984)
Hoffman v. Jones, 280 So.2d 431, 78 A.L.R.3d 321 (1973)
Kaatz v. State, 540 P.2d 1037 (1975)
Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858, 78 A.L.R.3d 393 (1975)
McIntyre v. Balentine, 833 S.W.2d 52 (1992)

Nelson v. Concrete Supply Co., 303 S. C. 243, 399 S.E.2d 783 (1991)
Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979)
Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981).

13) England established Contributory Negligence common law in Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809) and is available to Maryland citizens via Maryland Constitutional Declaration of Rights, Article 5(a). Butterfield appears as Petitioner's COA Petition paragraph **H26** and Campbell's COA Petition paragraph **H28**.

14) England established the Last Clear Chance defense to Contributory Negligence in Davies v. Mann, 10 Meeson & Welsby 546, 152 Eng. Rep. 588 (1842) and is available to Maryland citizens via Maryland Constitutional Declaration of Rights, Article 5(a). Davies appears as Petitioner's COA Petition paragraph **H27** and Campbell's COA Petition paragraph **H29**.

15) Petition, page 27, Irwin v. Spriggs which adopted Contributory Negligence common law in Maryland appears as Campbell's COA Petition paragraph **H30**.

16) N. C. R. R. Co. v. State. Use Price, 29 Md. 420 (1868) adopted Last Clear Chance defenses in Maryland and appears as Campbell's COA Petition paragraph **H31**.

II. REPLY TO BRIEF IN OPPOSITION

BY PARAGRAPH # FROM BG&E'S BRIEF

Cover) The cover states, "On Petition For Writ of Certiorari To The Court Of *Special* Appeals Of Maryland." However, since the COA made substantive rulings in *Appendices J & V* at App. 18 & 52, these Petitions for Writ of Certiorari are and would be to the COA (the state court of last resort) and not the COSA (which was not the state court of last resort - *Appendix F* at App. 9, paragraph 2).

Paragraph 1) The original Campbell v. BG&E Complaint was filed November 19, 1987 which was the 323rd day of 1987. The Campbell Complaint was the 51st case filed that day. The Campbell Case No. is 87 323 051.

Paragraph 3) Respondent BG&E received Petitioners list of 16 corrections and improvements to his Petition on June 22, 2005 (See page SB-2, #2). BG&E corrected the cite to Campbell v. BG&E, 331 Md. **196**, 627 A.2d 538 (1993).

Paragraph 5) Campbell filed a Notice of Appeal to the COSA on November 8, 2004 (*Appendix JJ* at App. 126). Campbell was scheduled to file a Brief of Appellant in the COSA on or before March 23, 2005. Between these two dates, Campbell filed a Petition for Writ of Certiorari to the COSA in the COA on December 2, 2004, the Petition was denied by the COA on December 23, 2004 (*Appendix V* at App. 52), Campbell filed a Motion for Reconsideration in the COA on January 21, 2005, and the Motion was denied

by the COA on March 14, 2005 (*Appendix W* at App. 53). The entire time the COA was considering Campbell's Petition for Writ of Certiorari to the COSA in 2004 and 2005, Campbell had a COSA appeal pending. After Campbell was no longer in the COA but had his final judgment from that state court of last resort, he failed to file a Brief of Appellant in the COSA. His COSA appeal was subsequently dismissed April 13, 2005. Therefore, this Court has jurisdiction to consider a Campbell v. BG&E Petition or Conditional Cross-Petition for Writ of Certiorari to the COA (*Appendix F* at App. 9, paragraph 2). **Paragraph 6)** Of interest is a nearly identical case to Campbell, supra, Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S. E.2d 879 (1979). The highest court of W. Va. (The Supreme Court of Appeals of West Virginia) did find Bradley, supra, desirable and in the public interest and, moreover, converted from Contributory Negligence to a 49% comparative negligence common law. This means a Plaintiff could recover if his/her negligence was less than that of the Defendant(s). Campbell notified the COA of this fact in his Motion for Reconsideration filed January 21, 2005 (*Appendix KK* at App. 129, App. 131 - App. 137 & App. 146). The COA denied his Motion without explanation on March 14, 2005.

West Virginia's 49% Comparative Negligence law is a Contributory Negligence common law addressed by the Reply Questions Presented for Review, #7 (page i herein). In cases where two parties share all the culpability for one of the parties injuries, a judge or jury should be free to access equal culpability to the parties and expect each party to share one half of the financial liability for the

victim's medical expenses and other damages.

Can any human being objectively and accurately determine .000001% of the culpability distribution between two parties which makes the difference between recovery or no recovery for the victim? Herein lies the injustice with 50%, 49%, slight/gross, and contributory negligence laws. Each has a discontinuous boundary between no liability, some liability, or all liability. These laws are flawed due to these discontinuous boundaries. These laws invite capricious judgments by fact-finders inclusive of judges dismissing Complaints wherein a Jury Trial was elected. The later violates the 7th U. S. Amendment. By eliminating these discontinuous boundaries, Pure Comparative Negligence is created.

Paragraph 7) If the Campbell, supra, Judgment Notwithstanding the Verdict of 12/13/91 is discovered with the passage of time to be erroneous, not to revise the J. N. O. V. permits a correctable violation of the 7th U. S. Amendment to exist in history. Was Campbell's 7th U. S. Amendment right violated in Campbell v. BG&E? That federal question, is perpetuated in history until the erroneous J. N. O. V. is corrected? Therefore, by denying to revise the J. N. O. V., the federal question is decided with the answer "no" and perpetuates. Conversely, to revise the J. N. O. V. decides the federal question with the answer "yes" and the question is reduced in importance and more quickly forgotten.

Campbell felt the cost of this violated 7th Amendment yesterday, as he feels it today, and will feel it tomorrow. The federal question was decided by the

Circuit Court for Baltimore City when it denied to revise and, in effect, condoned the reexamination of the Campbell jury verdict. The federal question is decided each time Campbell is appealed.

Paragraphs 8 & 9) Petitioner hereafter attempts to further clarify the Petition or Conditional Cross-Petition that Campbell has abandoned for whatever reason. Petitioner hopes an intervenor will do likewise when he/she is granted leave to file a Petition or Conditional Cross-Petition for Writ of Certiorari to the COA.

CAMPBELL v. BG&E OPINIONS

The Order of the COA in *Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company* (Petition Docket No. 490, September Term 2004, December 23, 2004) is reprinted in its entirety at *Appendix V* (App. 52). Because the questions presented to the COA concerned a critical review of the fairness and justness of Maryland's contributory negligence common law and the COSA could not consider these questions (See *Appendix F* at App. 9), the Order of the COA was a final judgment from the Maryland court of last resort. A Notice of Appeal to the COSA was filed November 8, 2004 (*Appendix JJ* at App. 126). Campbell did not pursue a COSA Opinion in this case subsequent to November 8, 2004 because the COSA was not the Maryland court of last resort. Campbell's COSA appeal was dismissed April 13, 2005. The Order of the Circuit Court for Baltimore City, Maryland (Case No. 24-C-87323051 / CL73959, September 16, 2004) is

reprinted in its entirety at *Appendix T* (App. 50). The Order of the Circuit Court for Baltimore City, Maryland to a Motion to Alter or Amend a Judgment - Court Decision (Case No. 24-C-87323051 / CL73959, November 3, 2004) is reprinted in its entirety at *Appendix U* (App. 51). An Order of the COA in the previous appeal of *Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company* (Petition Docket No. 117, September Term 1993, July 21, 1993 reported as 331 Md. 196, 627 A.2d 538 (1993)) is reprinted in its entirety at *Appendix Q* (App. 47). The previous Opinion of the COSA in *Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company* (No. 732, September Term 1992, February 1, 1993 reported as 95 Md. App. 86, 619 A.2d 213 (1993)) is reprinted in its entirety at *Appendix O* (App. 32). The previous Judgment of the Circuit Court for Baltimore City, Maryland (Case No. 87323051 / CL73959, December 13, 1991) is reprinted in its entirety at *Appendix N* (App. 30). The previous Opinion of the Circuit Court for Baltimore City, Maryland (Case No. 87323051 / CL73959, December 13, 1991), was transcribed and is reprinted in its entirety at *Appendix M* (App. 27). *Appendix M* (App. 22) is the polling of the unanimous jury which was excused from the courtroom immediately preceded the 12/13/91 Opinion of Circuit Court (*Appendix M* at App. 27). That 12/13/91 Opinion granted a Judgment Notwithstanding the Verdict to Respondent BG&E after a jury pronounced its verdict in favor of Respondent Campbell and was excused from the courtroom. Petitioner herein alleges this was a violation of the 7th U. S. Amendment.

CAMPBELL v. BG&E JURISDICTION

An intervenor would seek this Court's review of the Order entered in Campbell v. BG&E on December 23, 2004, by the COA. The COA denied Respondent Campbell's Motion for Reconsideration by Order at *Appendix W* (App. 53) entered on March 14, 2005 and prior to Campbell missing the COSA deadline to file a Brief of Appellant, March 23, 2005. The Jurisdiction of this Court would be invoked pursuant to 28 U. S. C. § 1257(a). In accordance with Hunter v. Ohio ex rel. Miller, 396 U. S. 879 (1969), the jurisdiction of this Court would also be invoked pursuant to 28 U. S. C. § 1257(a) which replaced 28 U. S. C. § 1257(3) if an intervenor files a Petition or Conditional Cross-Petition.

CAMPBELL v. BG&E ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of Maryland, Declaration of Rights, Article 5(a) provides, in pertinent part:.

> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of

> Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.

In accordance with Supreme Court Rule 33.1(d), this Reply Brief contains verbatim text and may be 10 and 2/3rds pages long.

STATEMENT OF CASE

Campbell v. BG&E (App. L - W & App. II - LL):

This Statement of Case in Campbell Supplements what the Petition filed in this Court has already stated. Campbell's Trial Attorney, William F. Gately, presented Campbell's *last chance* defense to the Baltimore City trial judge while the jury had retired (*Appendix II* at App. 121). Despite this, the trial judge missed what the jury concluded after deliberation. The Jury had the evidence at presented to it that SRSC foreman Mark Jenkins was the one who pushed the ladder extension into the power line and caused Campbell's life threatening injuries while Campbell passively had the ladder in the vertical position.

Maryland Rule 2-519(b & d) - **Motion for Judgment.**

(b) *Disposition.* When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

(d) *Reservation of decision in jury cases.* In a jury trial, if a motion for judgment is made at the close of all evidence, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge the jury. For the purpose of appeal, the reservation constitutes a denial of the motion unless a judgment notwithstanding the verdict has been entered.

Maryland Rule 2-532(e) - **Motion for judgment notwithstanding the verdict (J. N. O. V.).**

(e) *Disposition.* If a verdict has been returned, the court may deny the motion, or it may grant the motion, set aside any judgment entered on the verdict, and direct the entry of a new judgment. If a verdict has not been returned, the court may grant

> the motion and direct the entry of judgment or order a new trial. If a party's motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for a new trial, if any, should the judgment thereafter be reversed on appeal.

Maryland Rule 2-535(b) - **Revisory power**.

> (b) *Fraud, mistake, irregularity.* On motion of any party filed **at any time**, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Campbell filed a Motion for Revisory Powers in the Circuit Court for Baltimore City (*Appendix T* at App. 50) on August 24, 2004. Petitioner attached a copy of this Motion for Revisory Powers to his Motion for Reconsideration in the COSA (*Appendix I* at App. 17).

The Circuit Court judge recognized it could not grant a J. N. O. V. if there was any way the Jury decision was rational, "no matter how slight," (*Appendix M* at App. 27 - 28) as did the COSA, "however slight," (*Appendix O* at App. 39).

REASON FOR GRANTING THE WRIT

This Reason for Granting the Writ in Campbell Supplements what the Petition filed in this Court has already stated. First and foremost, does the Supreme Court have jurisdiction. Is there an independent and adequate

state ground to keep the Supreme Court out of these matters involving 7th Amendment rights to preserved jury trials. Certainly, Maryland Declaration of Rights Articles 5(b), 20, and 23 encourage the grant of the preserved jury trial and preservation of the jury verdict.

In Respondent Campbell's COA appeal, he alleges an irregularity was made by the Circuit Court for Baltimore City that stripped his $4.85 million jury award using the common law of contributory negligence as an excuse. No clearer way to show that contributory negligence is a vestige of the past and is unconstitutional. When the Trial Court made the Judgment NOV, it was required to determine if there is any way the jury verdict was reachable. They missed what this Petitioner and Respondent Campbell's COA Petition have discovered. The jury verdict was possible and even reasonable. An "irregularity," as used in Rule 2-535(b), means "the doing or not doing of that, in the conduct of a suit, which, conformable to the practice of the court, ought or ought not to be done." Early v. Early, 338 Md. 639, 659 A.2d 1334 (1995). In Weitz v MacKenzie et ux., 273 Md. 628, 331 A.2d 291 (1975). See Petition No. 04-1676, pages 26-27.

As addressed by the Reply Questions Presented for Review, #6 (page i herein), the Federal 7th Amendment may require the 14th Amendment concerning due process to make the 7th Amendment applicable to States. Maryland is making great strides to keep contributory negligence while its citizens suffer.

The Supplemental Brief at page SB-4 gives English Contributory Negligence common law that Maryland Declaration of Rights, Article 5(a), imported to Maryland.

CONCLUSION

For the reasons stated herein and in Petition No. 04-1676, Petitioner prays this Court grant his petition for certiorari to the COA in Mercer v. Thomas and review the latest COA decision in Campbell v. BG&E.

In accordance with Supreme Court Rule 33.1(d), this Reply Brief contains the verbatim text of a Constitutional Provision, Maryland Declaration of Rights, Article 5(a), pages RB-6 & RB-7, and may be 10 and 2/3rds pages long.

Respectfully submitted,

Gregory Shawn Mercer
Pro Se
Counsel of Record

APPENDIX II

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

Case No: 87323051 / CL73959

****

ROBERT B. CAMPBELL, JR., Plaintiff vs.

BALTIMORE GAS & ELECTRIC COMPANY,
a body corporate, Defendant

****

BALTIMORE GAS & ELECTRIC COMPANY,
a body corporate, Third-party Plaintiff vs.

WILLIAM SIEGLEIN, et al., Third-party Defendants

****

TRANSCRIPT (December 11, 1991)

Respondent Campbell's COA
Petition paragraph **H18**
(December 2, 2004)

H18. BG&E's Motion for Judgment at the end of Plaintiff's case [E706-E732]. Petitioner filed an 87-page Opposition to [BG&E's] Motion for Judgment in Court on December 11th, 1991 [E727]:

> MS. BORTZ (Counsel for BG&E): Your Honor, at this time we would move for a judgment at the conclusion of the Plaintiff's case [E706].
>
> * * * * *
>
> THE COURT: You've really gone through all of this in your opposition. Do you want this opposition filed?
>
> MR. GATELY (Counsel for Plaintiff Campbell): Yes, I do, Your Honor.
>
> THE COURT: All right. You don't need to repeat it all.
>
> MR. GATELY: All right. The cases that Mrs. Bortz relied on, those specific cases are dramatically, factually distinguishable on the facts in the case. Then you look to the facts that we have in this case that aren't in that case. And as I say, it's the illusion, it's the combination of lines. It's the fact the Jury is entitled to say hey look, wait a minute. These things are in a vertical line. Yeah, they do – they are in fact four, five, six feet outside the fence back where these people enter the

property. Yes, gee whiz, a man [SRSC owner Sieglein] with 35 years experience came and was of the same impression, the lines are outside the fence.

That man, in turn, sent his nephew [SRSC foreman Jenkins] and his employee [SRSC employee Campbell - Petitioner] there. And gee, the man is 30 years old with 12 or 13 years experience doing this housing, doing this siding work. Mr. Jenkins, gee, he was fooled by that configuration of lines. He did the same thing. They're entitled to look at all that and say, you know, this 18 [sic. - 19] year old boy was not negligent. Everyone else was tricked by this thing the same way he was. He believed they're outside the fence. He stood there, he had his back to the wires the whole hour [sic. - two hours] and 15 minutes he was there –

THE COURT: But why do they have to move the closest point in the yard that they could move it to?

MR. GATELY: Here's why. They didn't do that by choice. Their mind set was the lines are well outside the fence. And the lower lines that remain –

THE COURT: But be careful, why wouldn't they move as far away from it as they could get?

MR. GATELY: That assumes – the line is three or four feet back, three to four feet back. The ladder

was right against the fence. They footed the ladder up, then Campbell has the right to say he's going to look – he'll raise the ladder, and he's going to take a look and see if there's anything there. He's not stupid, I trust him. And the guy pushes the ladder up. Jenkins – if Jenkins was negligent, if Jenkins was negligent, and this is where everything sort of starts sliding together down under the plaintiff.

His negligence can not be imputed to Campbell. He was the foreman, he was directing the ladder in the thing, he had the **last chance** to look up. And if a jury is ready to say he should've looked, his negligence in doing that can not be imputed to Campbell. We're giving you a whole host of cases in that proposition, Your Honor. This is a case where the jury clearly has the right to assess Campbell's conduct in this matter.

THE COURT: Madame Clerk, may I see Plaintiff's Exhibit Two? It's a photograph.

MR. GATELY: Is that my photo taken from the back of the house? Yeah, that's it.

THE COURT: Well, let me just see – let me see all of those. I think it is possible that they could've – he could've braced himself against the side of the house and had the ladder extended in the middle of the yard so it would be prepared as it's extended up to lean toward the house. Or they could've moved – they could've come back down here to the back

part of the house near the pad and instead of having the ladder leaning toward Bishop's lane, he could've braced himself against the fence and had the ladder leaning toward the back porch and then moved it over. I don't know why in the world they would just go over as far as they could toward the line, and try to extend the ladder there. I mean this yard is so narrow.

MR. GATELY: And here's the reason if I can see that further, Your Honor. Here's the reason according to Jenkins' testimony –

THE COURT: This is Plaintiff's Three.

MR. GATELY: Here's the reason according to Jenkins' testimony. When you come into this yard back here, this plane of lines certainly appears to be well outside the fence. That's the mind set that Jenkins has. He says these wires are well outside of this fence. That sticks in his mind. He moves the ladder down there. When he's getting ready to move it – he doesn't – he's never testified I saw that one wire way up there, and I know that that encroached in. Because you remember, Your Honor –

MS. BORTZ: Exception – Your Honor.

MR. GATELY: – these wires all run to the same pole. These wires all run from the same pole. This

high wire runs and is connected --

THE COURT: I know. It's on a cross arm.

MR. GATELY: On a cross arm. It encroaches in. Jenkins never said I knew they were well outside the fence, but I knew that one was going to drift in and tie into the cross arm. He doesn't know that, he's never testified that he knew that. Your Honor, he made a mistake. Put it this way, he was wrong. But that's the reason why he believed these wires were out there and they could raise this ladder here.

In any event, he called Campbell over, and he directed the raising of the ladder. The ladder did not touch those lower wires. Had that wire up there, the very top wire, been tied to that outside cross arm and all these other wires been well outside the fence, we would not have had this accident.

THE COURT: We don't know that.

MR. GATELY: Yes, we do know that.

THE COURT: Well that may or may not be true. But it's still hard to ignore the fact that they moved as close to the line as they could get, rather than being as far away from it as they could get.

MR. GATELY: That sounds as though they chose to move as close to the line, Your Honor.

THE COURT: But they did make a choice, didn't they?

MR. GATELY: The ladder – the ladder foot was against the fence. When they raised it, that's where it is. They believe – Jenkins believes, Jenkins consciously believes all the other lines are three to four feet outside of the fence. He's one to two feet inside the fence. He's going to show up – shell up [sic. - shove up]. He doesn't know that one is encroaching over.

THE COURT: All right.

MR. GATELY: Now if that's a mistake on his part, and if that mistake rises to the level of negligence, that is not imputable to Campbell. Campbell didn't make the choice of how, when and in what way to raise the ladder. You laugh, Your Honor, or you seem to discredit the distinction –

THE COURT: I'm not laughing. I haven't laughed at all.

MR. GATELY: Okay. You seem to make little –

THE COURT: I giggled the –

MR. GATELY: I meant latter – earlier. You seem to diminish the foreman/supervisor distinction.

THE COURT: Oh, I said – I said that I thought that it was a certain silliness to try to make such a strong argument about a two-worker company, that one was a foreman over the other.

MR. GATELY: The point is that he was foreman and he supervised, he directed how that ladder was to be risen, and I think that's critical in the case law, and I think the Jury's certainly entitled to assume that.

THE COURT: I know you do. I know you do. I don't think it's as critical as you do. I'm going to reserve on the motion. All right, bring the Jury. Looks like we're only going to have time for one witness. How long is this witness going to be, Miss Bortz [E727-E732]?

APPENDIX JJ

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

Case No: 24-C-87323051 / CL73959

ROBERT B. CAMPBELL, JR., Plaintiff vs.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Defendant

NOTICE OF APPEAL
(November 8, 2004)

COMES NOW Plaintiff, Robert B. Campbell, Jr. (hereafter Appellant), in accordance with Maryland Rule 8-201 & 8-202(c), and appeals to the Court of Special Appeals of Maryland three (3) Circuit Court of Baltimore City Judgments:

a) Plaintiff's Maryland Rule 2-342 Motion for Leave to Amend Motion for Revisory Powers and Request for Hearing which was denied the 16th day of September, 2004.
b) Plaintiff's Maryland Rule 2-535(b) Motion for Revisory Powers which was denied the 16th day of September, 2004.
c) Plaintiff's Maryland Rule 2-534 Motion to Alter or Amend a Judgment - Court Decision which was

denied the 5th day of November, 2004.

Respectfully submitted,

s/ Robert B. Campbell
Robert B. Campbell, Jr., pro se
683 Windsor Drive
Westminster, Maryland 21158
410-840-8890

APPENDIX KK

IN THE COURT OF APPEALS OF MARYLAND

Petition No. 490, September Term 2004

ROBERT B. CAMPBELL, JR., Petitioner vs.

BALTIMORE GAS & ELECTRIC COMPANY, a body corporate, Respondent

MOTION FOR RECONSIDERATION
(January 21, 2005)

COMES NOW Petitioner, Robert B. Campbell, Jr., pro se, in timely accordance with Maryland Rule 8-605(a), and states the following:

1. The date of this Court's denial Order is also the date that the Petitioner filed his Reply to Response/Answer to Petition for Writ of *Certiorari*, December 23, 2004. The Petition for Writ of *Certiorari* was filed December 2, 2004 and preceded this Court's latest denial Order by only 21 days. This Court's denial Order states, "Upon consideration of the petition for writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is ORDERED, ..." It appears to Petitioner that his Reply to Response/Answer was not considered by this Court. Petitioner respectfully moves this Court to consider his Reply to Response/Answer in addition to the content of this Motion for Reconsideration

before deciding the disposition of this Petition.

2. Comparable case law exists in Brenda Sue Bradley v. Appalachian Power Company; Brady Napier v. Elk Grocery Company, Appeal Nos. 14310 & 14345, Supreme Court of Appeals of West Virginia, 163 W. Va. 332, 256 S.E.2d 879 (1979) where **the highest court of West Virginia did find a West Virginia Kanawha County Circuit Court case *desirable and in the public interest* for review (see attachments) and which is analogous to the underlying Maryland Baltimore City Circuit Court case, Campbell v. Baltimore Gas and Electric Corporation, Case No. 87323051 / CL73959 or 24-C-87-323051, discussed in this appeal**. In fact, the highest court of West Virginia changed its Contributory Negligence common law to a 49% modified Comparative Negligence common law based on the review of the analogous Kanawha County Circuit Court case and one other case. Maryland's General Assembly came closest to adopting a 49% modified Comparative Negligence common law with SB21 in 1985. Petitioner advocates judicially abrogating Maryland's Contributory Negligence common law for the 49% modified Comparative Negligence common law based on SB21 from 1985 in his Petition for Writ of *Certiorari* to the Court of Special Appeals being reconsidered herein (See paragraph **H36** and page 25 of Petition).

3. Further, unlike Petitioner's previous appeals in 1992-93 which could not have advanced to the Supreme Court of the United States of America due to that Court's respect for States' Rights, this appeal gives an instance where Maryland Rule 2-532 was erroneously applied by

the Circuit Court to overturn a lawful and reasonable jury verdict favorable to Petitioner. The rationale for applying Maryland Rule 2-532 was that Petitioner had been Contributorily Negligent as a matter of law ***without any further inquiry into whether that Contributory Negligence as a matter of law was, in fact, a cause of Petitioner's injury***. In this appeal, Petitioner alleges that a common law which is not free and clear from doubt as to have statutory status, Contributory Negligence, was erroneously used via Maryland Rule 2-532 to violate Petitioner's Right to a Jury Trial elected in his original Complaint on or about November 19, 1987. Petitioner's Rights found in Maryland Declaration of Rights (Articles 5, 20, and 23) and United States Constitutional Amendment 7 have been violated using a common law contrary to Maryland Declaration of Rights, Article 5(a).

4. Maryland Declaration of Rights, Article 5(a) states, "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury ... except such as ... may be inconsistent with the provisions of this [Maryland] Constitution." The English case Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K. B. 1809) (See paragraph **H28** in Petition) created the common law of Contributory Negligence in England. In this appeal, the common law of Butterfield v. Forrester is inconsistent with the provisions of the Maryland Constitution found in the Maryland Declaration of Rights (Articles 5, 20, and 23). **Either Maryland's Contributory Negligence common law is unconstitutional or Maryland's Declaration of Rights (Articles 5, 20, and 23) are unconstitutional. This appeal tests the constitutionality of Maryland's**

Contributory Negligence common law and is *most desirable and in the public interest* for review by this Court.

5. Petitioner alleges the Circuit Court Judge missed the inference that the Jury Verdict was a Last Clear Chance Jury Verdict which lawfully and reasonably awarded Petitioner $4.85 million in December of 1991. The Judge should not have granted BG&E' s Motion for Judgment NOV without first determining if Petitioner's Contributory Negligence as a matter of law was a cause of Petitioner's injury. Contributory Negligence as a matter of law has been affirmed on appeal in the Court of Special Appeals but whether that Contributory Negligence as a matter of law was a cause of Petitioner's injury has never been reviewed by any appellate court. This is a necessary element of a BG&E affirmative defense of Contributory Negligence. The Circuit Court retains jurisdiction on this issue of whether Petitioner's negligence was a cause of his injury and the Petitioner was proper to file a Maryland Rule 2-535(b) Motion for Revisory Powers. ***Respondent has even concurred with this fact indirectly in Paragraph 3 of Response/Answer to Petition for Writ of Certiorari by stating that the issue of Last Clear Chance has not been previously raised in the Court of Special Appeals.***

6. In Brenda Sue Bradley v. Appalachian Power Company, Civil Action No. 12,564, in the Circuit Court of Kanawha County, West Virginia, the Plaintiff was the Administratrix of the Estate of Ernest Edward Bradley, her late husband. On the day of the accident, August 6, 1971, Ernest was 33, Brenda was 26, they had been married for one year eight months, and they had two children aged 2

and 3 with Brenda 2 months pregnant with a third child.

7. Ernest worked as a dump truck driver for the Scales Company which was contracted to deliver coal from a mountain where it had been stripped to the hopper of a specific "tipple" where conveyer belts moved the coal to a crusher and the coal was loaded into train(?) "cars". Ernest would back his dump truck up on the non-level road surface to the hopper where he dumped the coal from the bed of his truck. Approximately 200 feet from the hopper and above the uneven road was a primary, uninsulated power line. The lowest point in the "sag" of the power line was measured as 20 feet 1 inch above the non-level road by an employee of the Appalachian Power Company, Jimmie Butcher. It was a fact in dispute as to whether the power line was actually the recommended standard National Electric Safety Code (N. E. S. C.) height of 20 feet above the non-level road surface across the entire approximately 30-foot or 40-foot wide uneven road where Ernest raised the bed of his dump truck into the power line igniting the tires of the dump truck simultaneously causing Ernest's electrocution and death.

8. The owner of the company that was contracted to oversee delivery of coal to that tipple, Arthur C. Rogers, and who contracted with the Scales Company for dump truck service never asked Appalachian Power Company to move, to raise, and/or to insulate the power lines in the three years prior to the accident nor the year subsequent to the accident at which time Mr. Rogers sold his company. That a dump truck bed would eventually hit the power line without the power line being moved, raised, and/or insulated was arguably foreseeable by Appalachian Power

Company, a corporation.

9. Ernest's widow, Brenda, as Administratrix of Ernest's Estate, sued Appalachian Power Company in a wrongful death suit and elected a jury trial. She requested the following jury instruction (Plaintiff's Instruction No. 1) on Comparative Negligence, was refused, and she made an objection:

> The jury is instructed that in this action, the fact that Ernest Edward Bradley, the decedent may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to Ernest Edward Bradley, deceased.
>
> So, if you should find, from a preponderance of the evidence in this case, that the defendant, Appalachian Power Company, a corporation was guilty of negligence which caused, in whole or in part, any injury or death to the plaintiff, Ernest Edward Bradley, and should you further find, from a preponderance of the evidence in the case, that the plaintiff's decedent was guilty of some contributory negligence which contributed toward bringing about all or part of his own injury; then the total award of damages to the plaintiff must be reduced by an amount equal to the percentage of fault or contributory negligence chargeable to the plaintiff.

10. According to Plaintiff's Petition for Appeal

which the Defendant apparently did not refute, Appalachian Power Company requested and received the following jury instruction (Defendant's Instruction No. 15) on contributory negligence:

> The Court instructs the jury that the law does not permit a person to recover damages for injuries to which his own negligence contributed, even in the slightest degree.
>
> Therefore, even if you believe from a preponderance of the evidence in this case that the defendant was guilty of negligence which was a proximate cause of the accident, still, if you further believe from the evidence that the plaintiff's decedent was also guilty of negligence and that such negligence on his part proximately contributed to the accident, even in the slightest degree, then the law does not permit you to balance or compare the degrees of negligence of which the plaintiff and the defendant may be guilty, but in such case, the plaintiff is not entitled to recover anything in this action and your verdict should be for the defendant.

11. However, according to the transcript of the trial as transcribed by the Official Reporter of the Circuit Court of Kanawha County, West Virginia, Caryl T. Burke, Defendant's Instruction No. 15 was requested and refused due to the Court's earlier choice to give a modified Plaintiff instruction (Plaintiff's Instruction No. 2-A):

(Original Plaintiff's Instruction No. 2) The Court instructs the jury that if you believe by a preponderance of the evidence that the defendant, Appalachian Power Company, a corporation, negligently caused the plaintiff's decedent, Ernest Edward Bradley, to be electrocuted, and as a proximate cause thereof the plaintiff's decedent, Ernest Edward Bradley, died then your verdict may be for the plaintiff, Brenda Sue Bradley, Administratrix of the Estate of Ernest Edward Bradley, Deceased, and against the defendant, Appalachian Power Company, a corporation, **(to which the Court added - Plaintiff's Instruction No. 2-A)** unless you further believe that the decedent, Ernest Edward Bradley, was negligent, which negligence proximately caused or contributed to his death.

Additionally, Defendant's Instruction No. 16 was given:

The Court instructs the jury that it was the duty of the plaintiff's decedent, Ernest Edward Bradley, in performing his work at the scene of the accident in question to use reasonable care for his own safety and not to negligently expose himself to dangers, which he knew existed, or which in the exercise of ordinary care, he should have known existed. Therefore, if you find from a preponderance of evidence in this case that Ernest Edward Bradley at the time and place of the accident in question, knew or in the exercise of

> ordinary care should have known that the power line crossed the roadway and of the dangers involved in raising the bed of his truck to come in contact with the power line and failed to exercise ordinary care for his own safety and that such failure, if any, on his part proximately contributed to the accident, even in the slightest degree, then the plaintiff is not entitled to recover anything in this action and your verdict should be for the defendant.

12. The Jury in the Circuit Court case of Bradley v. Appalachian Power Company, supra, found for the Defendant, the Plaintiff moved the Circuit Court to set aside the Jury Verdict and order a new trial on the grounds that the Court erred by failing to grant Plaintiff's Comparative Negligence instruction, and the Court denied Plaintiff's Motion for a New Trial. Plaintiff filed a Petition for Appeal limited to one issue which was granted on October 16, 1978, by the Supreme Court of Appeals of West Virginia (See attachments hereto):

> 1. The petitioner submits that the Trial Court erred in refusing to grant the petitioner's motion for a new trial on the grounds that the Trial Court erred in refusing to grant the petitioner's instruction on comparative negligence.

On appeal, the Supreme Court consolidated Plaintiff's appeal, Brenda Sue Bradley v. Appalachian Power Company, Appeal No. 14310, with a similar appeal, Brady

Napier v. Elk Grocery Company, Appeal No. 14345. Plaintiffs Bradley and Napier(?) won their appeals and West Virginia became a 49% modified Comparative Negligent State in 1979.

13. In Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, a body corporate, Case No. 87323051 / CL73959 or 24-C-87-323051, in the Circuit Court of Baltimore City, Maryland, the Petitioner herein (Robert B. Campbell, Jr.) was also electrocuted by a primary, uninsulated power line which was foreseeably negligently placed by a power company, but electrocution was on April 7, 1986 and the Petitioner survived. The power line failed to meet the recommended standard National Electric Safety Code (N. E. S. C.) separation of 10 feet from a residential structure and was 29 feet 6 inches above the ground and parallel to the 34-foot-high side of an approximately 75-year-old house. That the 75-year-old house would require maintenance along this side and that workmen would work within 10 feet of the primary, uninsulated power line was arguably foreseeable by Baltimore Gas and Electric Company, a body corporate. At trial based on the evidence, the jury found that BG&E was negligent in maintaining the power line because it did not move, raise and/or insulate the power line where electrical contact was foreseeable.

14. Petitioner was 19-years-old and worked for Sieglein Roofing and Siding Company (hereafter SRSC) cutting and bending a form of siding called soffit and fascia at a "cutting table" for the 32-year-old SRSC foreman, Mark S. Jenkins. Approximately two hours after SRSC commenced work at the new work site, after SRSC

owner/employer, William P. Sieglein, had completed his second inspection of the work site this time with the SRSC foreman at his side, after the SRSC employer had failed to notify BG&E to move, raise, and/or insulate the power line contrary to the Code of Maryland, after SRSC employer Sieglein had verbally warned SRSC foreman Jenkins to watch for power lines, the SRSC foreman Jenkins called SRSC employee Campbell (Petitioner herein) over from the cutting table to steady the base of a 40-foot unextended ladder approximately 21 feet tall. Petitioner had noticed the power lines two hours earlier and had dismissed any safety concerns caused by them due to their placement outside the work-site, property-line fence.

15. At the moment Petitioner grabbed and steadied the unextended 40-foot ladder using the fence to brace himself, the relevant power line was approximately 8 feet higher than the top of the unextended ladder. ***Petitioner's act of steadying the ladder did not cause electrical contact nor cause him any injury***. However, Petitioner did not look upward as his concentration was focused on steadying the base of the ladder for the SRSC foreman who wished to work at the 34-foot-high peak of the house. While Petitioner steadied the base of the ladder, SRSC foreman Jenkins extended the ladder by pushing up on the extending portion of the ladder and climbed while continuing to extend the ladder looking in the direction of the relevant power line. Roughly two hours earlier, SRSC foreman Jenkins had been admonished to watch for just such a power line by the SRSC owner/employer Sieglein.

16. When electrical contact was made with the 7,620-volt, uninsulated power line 29 feet 6 inches above

the ground, only the Petitioner was injured as he grounded the ladder with his body to the fence. Foreman Jenkins was able to jump from the ladder unharmed. Petitioner was electrocuted, suffered deforming injuries to his hands and arms, was badly burned, and is now permanently disabled. ***The extension of the ladder by the SRSC foreman had been the proximate cause of Petitioner's electrocution injuries and followed the SRSC employer's failure to notify BG&E to move, to raise, and/or to insulate the power lines in accordance with the Code of Maryland.***

17. Petitioner's failure to look upward for the uninsulated power line approximately 8 feet above the top of the ladder while steadying the ladder was Contributorily Negligent as a matter of law as determined by the Circuit Court and affirmed by the Court of Special Appeals of Maryland. This Contributory Negligence as a matter of law was not sufficient to cause electrical contact, electrocution, nor injury. ***Neither the Circuit Court nor the Court of Special Appeals ever considered whether Petitioner's Contributory Negligence as a matter of law was a proximate cause of Petitioner's injuries.***

18. At trial, the Circuit Court had instructed the jury twice on Contributory Negligence based on evidence presented to the jury which supported a Last Clear Chance defense for the Petitioner. The jury which arguably contained a personal injury attorney named Pauline Olsen who would have had knowledge of Last Clear Chance arguments deliberated 8 years after a Last Clear Chance argument was used successfully in Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983). This permitted any

subsequent juror and/or jury to deliberate with and apply Last Clear Chance arguments before reaching a jury verdict. **However, the Circuit Court in Campbell v. Baltimore Gas and Electric Company, supra, provided the jury with a jury sheet which had a defective question #2 which precluded the jury from finding Petitioner Contributorily Negligent but not a cause of his own injury and then permit the jury to give the Petitioner an award (See H13 below: *Answer question #2 "yes" then try to follow the jury sheet and reach questions #3 through #6 to make a jury award - This is not possible!*)**:

> **H12.** Circuit Court instructed Jury twice. Once after it requested re-instruction while deliberating, Motion for Revisory Powers, page 4:
>
> > 7. The jury received jury instructions, began deliberation, then requested to be re-instructed on Contributory Negligence:
> >
> > > A Plaintiff cannot recover if his negligence is a cause of his injury. ... To ... be barred, the negligence must be a cause of an injury [E882].
> >
> > * * * * *
> >
> > > A Plaintiff cannot recover if his negligence is a cause of his injury [E894].

H11. The available Last Clear Chance defense that existed for the Petitioner at the end of all evidence was:

a) SRSC employer was Primarily Negligent (Maryland Annotated Code, Article 89, §§ 58-60 attached to Petition).

b) SRSC employer was aware of the Primary Negligence situation of peril and communicated a warning concerning this to the SRSC foreman.

c) Petitioner was Contributorily Negligent (Maryland Annotated Code, Article 89, §§ 58, 60-61 attached to Petition).

d) Petitioner's Contributory Negligence by itself was not sufficient to cause his injuries.

e) Primary and Contributory Negligence were not concurrent so SRSC clearly made the original mistake.

f) SRSC foreman was Secondarily Negligent (Maryland Annotated Code, Article 89, §§ 58, 60-61 attached to Petition).

g) Secondary Negligence was new and independent of Primary Negligence.

h) SRSC foreman looked upward toward the line-to-ground, RMS, 7,600-volt power line which was located in plain view above while pushing up on the ladder extension and was aware of the Secondary Negligent situation of peril previously brought to his attention by the SRSC employer a couple

hours earlier (Maryland Annotated Code, Article 89, §§ 58, 60, and 61).

i) The Last Clear Chance fresh opportunity was of a considerable amount of time as compared to 7.33 seconds in Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983) where a Last Clear Chance defense was used successfully (See **H33**).

H13. After Cohen v. Rubin, supra, any Maryland Jury was empowered to deliberate with the Last Clear Chance theory. The actual Jury Verdict Sheet in Robert B. Campbell v. Baltimore Gas and Electric Company, Case No. 87323051 / CL73959, December 13, 1991 with the Jury findings [E83-E84, E895-E898] (attached to Petition) was:

1. Was BG&E negligent? Yes _X_ No ___
2. Was Robert Campbell contributorily negligent? Yes ___ No _X_

   [If the answer to #2 is "no," then continue; if "yes," then stop.]
3. Did Robert Campbell assume the risk of his injury? Yes ___ No _X_
4. Was Mark Jenkins negligent? Yes ___ No _X_
5. Was William Sieglein negligent? Yes _X_ No ___
6. In what amount do you award damages?

   $ 4,850,000

H14. This Jury Verdict was a Last Clear Chance Jury Verdict:

William Sieglein was most associated with SRSC in the trial due to BG&E suing "William P. Sieglein trading as Sieglein Roofing and Siding Company". Sieglein's Motion Inlimini to prevent BG&E from referring to Sieglein the individual as the person responsible for notifying BG&E of the proximity of power lines to SRSC employees had been denied. SRSC foreman Mark Jenkins was not negligent, the company he worked for was negligent. Robert Campbell's Contributory Negligence was not a cause of his injury, SRSC foreman's pushing up to extend the ladder was the proximate cause of Petitioner's injury in accordance with the Jury Instructions given two times. Robert Campbell had been directed by his supervising foreman to hold the ladder steady. Additionally, the Jury found BG&E to be negligent. Therefore, Petitioner could have and should have recovered the Jury award from SRSC and BG&E jointly and severally.

H15. The Jury Verdict Sheet ambiguous Question No. 2:

> Was Robert Campbell contributory negligent? Yes ___ No ___ [E83 - E84].
>
> [If the answer to #2 is "no," then continue; if "yes," then stop.]

H16. To avoid ambiguity, the Jury Verdict Sheet Question No. 2 should have been:

> Was Robert Campbell contributory negligent and, if so, was his contributory negligence a cause of his injuries? Yes ____ No ____
>
> [If the answer to #2 is "no," then continue; if "yes," then stop.]

H17. At trial, there was prospective juror #3 who was a personal injury attorney, Pauline Olsen. Motion for Revisory Powers, pages 5-6:

> 14. Prospective Juror No. 3, attorney Pauline Olsen (spelled phonetically "Olson" in Transcript) [12/4/91 Trial Transcript pages 8, 43, 58, 63 - 64 attached to Petition], was at the top of the juror list after Voir Dire but before the four trial counsel exercised their strikes (4 each). This prospective juror knew of Last Clear Chance theory. The Trial Judge informed counsel the jurors were to be seated starting from the top of the juror list [page 63].

19. Also at trial, Petitioner requested the following jury instruction (Plaintiff's Request No. 16) on Comparative Negligence, was refused, and made an objection:

> **H20.** Petitioner's Request for Jury Instructions included a Comparative Negligence Instruction, Request No. 16. The Circuit Court denied this instruction and Petitioner noted his exception [E887-E888]:
>
> > If you find that plaintiff was negligent, and that his negligence contributed to his injuries, then you must determine the relative contributions (on a percentage basis) of the defendant BG&E's negligence and the plaintiff's negligence to those injuries and damages. Your assessment of the dollar value of the plaintiff's damages will then be reduced by the Court by the percentage which you attribute to the plaintiff's negligence [E927].

20. On appeal to the Court of Special Appeals of Maryland in 1992-93, the only two issues that Court considered were:

> 1. Whether the trial court erred in finding contributory negligence as a matter of law and granting BG&E's Motion for Judgment NOV.

2. Whether the trial court erred in refusing to instruct the jury on comparative negligence.

The Court of Special Appeals found Contributory Negligence as a matter of law ***without any further inquiry into whether that Contributory Negligence as a matter of law was, in fact, a cause of Petitioner's injury***. Also, the Court of Special Appeals followed this Court's precedent and found no error by the trial court in refusing to instruct the jury on Comparative Negligence which is a State Right in the opinion of the Supreme Court of the United States of America. The previous Petition to this Court in 1993 was denied.

21. Comparing the Circuit Court cases Bradley v. Appalachian Power Company, supra, and Campbell v. Baltimore Gas and Electric Company, supra, both cases involve electrocution by primary, uninsulated power lines placed by power companies where injurious or deadly electrical contact was foreseeable. Both cases commenced in Contributory Negligence States where the Plaintiffs' requested Comparative Negligence jury instructions to overcome Contributory Negligence were refused by the Circuit Court. In both cases, the victims were workmen who worked at job sites where the employer in charge could have contacted the power company to move, to raise, and/or to insulate the relevant power line but did not contact the power company. On appeal, both Plaintiffs requested review of whether the Circuit Court erred in not giving the comparative negligence instruction the difference being that West Virginia, which does not have an intermediate appellate court, was not required to hear

Bradley's appeal but found it ***desirable and in the public interest*** to hear Bradley's case.

22. The highest appellate court of Maryland, this Court, chose not to hear Petitioner's previous appeal in 1993 despite 46 other states having adopted some form of Comparative Negligence. Where West Virginia considered an analogous case ***desirable and in the public interest*** for review, this Court exercised a State Right in denying Petitioner's 1993 Petition. Petitioner was discouraged from continuing his appeal to the Supreme Court of the United States of America which respects States' Rights. The issues of whether the Maryland Circuit Court erred in failing to give Petitioner's Comparative Negligence instruction and of whether Petitioner was Contributory Negligent as a matter of law which was affirmed by the Court of Special Appeals are Res Judicata now. Petitioner's Petition for Writ of *Certiorari* to the Court of Special Appeals filed in this Court in 1993 was denied.

23. However, there has been no appellate review of whether Petitioner's Contributory Negligence as a matter of law was a cause of his injury and reasonable minds of a jury could find and actually might have already found in December of 1991 that it was the extension of the ladder by the SRSC foreman Jenkins along with the negligent placement of the power line by Baltimore Gas and Electric Company which were the proximate causes of this Petitioner's injuries. Where Maryland Declaration of Rights, Article 23, states "the right to trial by Jury of all issues of fact in civil proceedings ... shall be inviolably preserved," for the Circuit Court Judge to miss an

inference in the light most favorable to the Petitioner contrary to Maryland Rule 2-519(b) that the jury verdict was lawful and reasonable and for the Judge to erroneously grant BG&E's Judgment NOV via Maryland Rule 2-532 using Contributory Negligence to overturn that lawful and reasonable jury verdict makes this case ***most desirable and in the public interest***. ***The very constitutionality of Maryland's Contributory Negligence common law is brought into question because Contributory Negligence was used to violate Petitioner's rights to a Jury Trial which he elected on or about November 19, 1987 in his original Complaint.*** Petitioner alleges the application of Maryland Rule 2-532 by the Circuit Court Judge at trial in this case was an irregularity subject to Maryland Rule 2-535(b). Petitioner alleges the Circuit Court still retains jurisdiction over this issue.

24. Petitioner Campbell believes the issues raised by Petitioner Mercer in his Petition and Motion for Reconsideration now before this Court are similar and his issues parallel this Petitioner's issues. Despite 46 other states adopting some form of Comparative Negligence at least 13 years ago, the Maryland judicial and legislature branches of government are steadfastly resistant to change from Contributory Negligence. Petitioner wonders why this is. This change will eventually come to Maryland and seems destined to come from those most effected by the injustice of Contributory Negligence, Maryland citizens like this Petitioner.

WHEREFORE, Petitioner Robert B. Campbell, Jr., pro se, respectfully requests that this Court's denial Order

of his Petition for Writ of *Certiorari* to the Court of Special Appeals be reconsidered and the Petition be granted.

Respectfully Submitted,

s/ Robert B. Campbell, Jr.
Robert B. Campbell, Jr., pro se
683 Windsor Drive
Westminster, Maryland 21158
410-840-8890

(4)

No. 04 - 1676

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER,

Petitioner,

V.

WILLIAM ALOYSIOUS THOMAS, III, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

SUPPLEMENTAL BRIEF WITH APPENDIX TT:

In re GREGORY SHAWN MERCER, PETITIONER

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SUPPLEMENTAL BRIEF

C. In paragraph **A** on page SB - 1 in the previous Supplemental Brief filed with Reply Brief on July 22, 2005, Petitioner stated the Court of Appeals of Maryland (hereafter "COA") denied his last COA filing on July 18, 2005. That COA Order is included in this filing (*Appendix LL* at App. 150).

The fact Petitioner elected a Jury Trial which was denied by the Circuit Court for Prince George's County was before the COA when it Ruled on December 23, 2004 (*Appendix J* at App. 18) and again on March 14, 2005 (*Appendix K* at App. 19). This Federal Question deserved to be certified. Petitioner emphasizes his first question presented for review to this Court: Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence.

D. On June 13, 2005, Respondent Campbell missed a deadline to file a Petition in this Court (Rule 13.3). However, he was named as a Respondent in the Petition for this case which was put on the docket June 14, 2005. Campbell had until July 14, 2005 to file a Conditional Cross-Petition (Rule 12.5). Petitioner considered the possibility that Respondent BG&E settled with Campbell to keep Campbell out of this Court and isolate the Petitioner.

On July 14, 2005, Petitioner filed a Motion to Order or Compel [to learn the identity of the Campbell v. BG&E, December of 1991 jury members] / Motion to Appoint Counsel for Jury / Motion to Extend Leave for Jury to

Intervene and File a Conditional Cross-Petition for Writ of Certiorari (*Appendix MM* at App. 151). Petitioner's Motion was denied in the first instance and returned by the Clerk (*Appendix NN* at App. 159). This Court does not Order or Compel nor Appoint Counsel prior to a Petition being granted and scheduled for Oral Argument according to Chief Deputy Clerk Christopher W. Vasil.

The 7th Amendment which Petitioner argues was violated in Campbell, supra, states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Petitioner searched for the jury and attempted to find the Campbell file at the Maryland State Archives, Court of Special Appeals of Maryland, and Baltimore City Circuit Court (hereafter "MSA," "COSA," and "BCCC" respectively). Petitioner hoped to learn the identity of any Campbell jury members from documents in the case file. What Petitioner learned is that the first five of six folders prior to December 20, 1991 have been misplaced or destroyed (*Appendix OO* at App. 161). The lost folders contained the December 4, 1991 Voir Dire Sheets with prospective jurors names and the December 13, 1991 Jury Verdict Sheet signed by the Forewoman. Petitioner was not going to find an intervenor for Campbell from the Campbell Jury.

Petitioner decided to file a Petition for Common-Law Writ of Certiorari to the COA. The 150th day after Campbell's petition for rehearing denial (See *Appendices W & KK* at App. 53 & 128) is August 11, 2005. On August 1, 2005, Petitioner filed an Application to Chief and Circuit Justice Rehnquist for Extension of Time to File a Petition for Writ of Certiorari to the COA (*Appendix PP* at App. 168). Petitioner's Application was denied in the first instance and returned by the Clerk (*Appendix QQ* at App. 175). According to Deputy Clerk Jeffrey Atkins and despite *In re* Leaf Tobacco Board, 222 U.S. 578 (1911), Petitioner was not a COA joined party to Campbell, supra.

Petitioner went to the COA to get some documentary evidence that Campbell, supra, and Mercer, supra, were joined. All the COA would let Petitioner have despite his persistence was a Memorandum from the COA Clerk to the COA judges (*Appendix RR* at App. 177). Petitioner included this Memorandum as an exhibit in a letter to the Honorable William K. Suter, Clerk which was filed August 10th, 2005 requesting the Clerk-denied Application be sent to Chief and Circuit Justice Rehnquist (*Appendix SS* at App. 179). This letter includes exactly what each COA Petition stated about the other COA Petitioner's case and that both COA Petitioners were attempting to join the other via Maryland Rule 8-401(a). Deputy Clerk Jeffrey Atkins believed the Memorandum was still insufficient to prove the joining of the cases.

If the COA would only let Petitioner have this insufficient Memorandum and will give no further evidence that the cases were joined, this was evasion. Petitioner re-emphasizes his first question presented for

review to this Court: Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence.

E. WHEREFORE, will Respondent BG&E be allowed to influence Respondent Campbell and cause this Court to ignore an alleged violation of the 7th Amendment? Alternatively, if Campbell has gotten disillusioned and given up hope for recovery through legal means, will this Court then ignore an alleged violation of the 7th Amendment?

There are in issue important questions regarding the relation between the 7th Amendment to the United States Constitution and a law which has been used to overturn jury verdicts, Contributory Negligence. Petitioner prays this Court will use one of his Petitions to review COA Campbell v. BG&E, Petition Docket No. 490, September Term 2004 (Either Petition No. 04-1676 or the Petition for Common-Law Writ of Certiorari in *Appendix TT* at App. 189). ***This Petition for Common-Law Writ of Certiorari to the COA was filed on the 150th day after Campbell's petition for rehearing was denied* (*Appendix TT* at App. 189)**.

APPENDIX LL

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 434, September Term 2004
(No. 1713, September Term 2003,
Court of Special Appeals)

GREGORY SHAWN MERCER, [Petitioner] v.

WILLIAM ALOYSIOUS THOMAS, III, [Respondent]

ORDER

The Court having considered the motion for clarification and motion for certification that Federal questions were raised and decided filed in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the motions be, and they are hereby, denied.

s/ Robert M. Bell
CHIEF JUDGE

DATE: July 18, 2005

APPENDIX MM

No. 04-1676

IN THE SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER, Petitioner v.

WILLIAM ALOYSIOUS THOMAS, III, et al., Respondents

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

MOTION TO ORDER OR COMPEL

MOTION TO APPOINT COUNSEL FOR JURY

MOTION TO EXTEND LEAVE FOR JURY TO INTERVENE AND FILE A CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

GREGORY SHAWN MERCER, PRO SE
Counsel of Record
3114 Borge Street
Oakton, Virginia 22124
(703)-591-4662

Filed: July 14, 2005 Received: July 15, 2005

TABLE OF AUTHORITIES

Amendment VII to the U. S. Constitution [App.156]

COMES NOW the Petitioner, Gregory Shawn Mercer, pro se, and moves this Honorable Court to Order or Compel the retired trial judge and parties present at the December, 1991 trial of Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, a body corporate to provide this Court with the December 4, 1991 Voir Dire Sheet containing prospective jurors and the December 13, 1991 Jury Verdict Sheet signed by the Forewoman. Further, Petitioner moves this Honorable Court to appoint counsel to contact the actual Campbell, supra, jury to inform them that their unanimous jury verdict of December 13, 1991was nullified by the trial judge in what the Court of Appeals of Maryland Petitioner Campbell (Respondent Campbell, herein) has alleged was an erroneous Judgment Notwithstanding the Verdict (J. N. O. V.). Finally, Petitioner moves this Honorable Court to extend leave for the jury to intervene in order to defend their December 13, 1991 verdict and file a Conditional Cross-Petition for Writ of Certiorari to the Court of Appeals of Maryland. In support of his motion, Petitioner states as follows:

1. Petitioner Mercer has been convinced that Respondent Campbell (hereafter Campbell) has signed a settlement agreement in Respondent Baltimore Gas and Electric's (hereafter BGE's) interest containing a confidentiality clause.

2. While Petitioner has no proof of this fact since he was not provided with a copy, Respondent Campbell's actions or lack thereof since shortly after his January 21, 2005 Motion for Reconsideration was filed in the Court of Appeals of Maryland (hereafter COA) seriously suggest that an agreement does exist.

3. Campbell's COA Petition was "denied as there has been no showing that review by certiorari is desirable and in the public interest" on December 23, 2004. This was a substantive ruling therefore a Conditional Cross-Petition to this Court would be for Writ [of] Certiorari to the COA and not the Court of Special Appeals of Maryland (hereafter COSA).

4. Campbell's COA Petition presented the questions to the COA requesting critical review of the fairness and justness of Maryland's contributory negligence common law:

> **F1)** Whether or not the Judgment N. O. V. of December 13, 1991 was an irregularity subject to Maryland Rule 2-535(b) because the Circuit Court erred when it failed to resolve all inferences in the light most favorable to Petitioner/Plaintiff requiring consideration of the Jury Verdict as a Last Clear Chance Jury Verdict which presupposed Contributory Negligence on the part of the Petitioner but still would allow him to recover for his injuries.
>
> **F2)** Whether or not a Last Clear Chance Jury Verdict is consistent with the findings of the Circuit

Court and the Court of Special Appeals that Petitioner/Plaintiff was Contributory Negligent as a matter of law.

F3) Whether or not the Jury Answer to Jury Verdict Sheet Question No. 2 is ambiguous because the Jury could have deemed Petitioner's/Plaintiff's Contributory Negligence not to have been a cause of his injury since, without extension of the ladder by the company foreman, merely holding the ladder steady well below the power line would never have caused electrical contact nor injury.

F4) Whether or not, in the light most favorable to Petitioner/Plaintiff, the Circuit Court missed an inference wherein Petitioner had a Last Clear Chance defense against his employer (Sieglein Roofing and Siding Company) via the Primary Negligence of its owner and the Secondary Negligence of its foreman.

F5) Whether or not Petitioner's right to a jury trial and right to equal protection of the law to have a Last Clear Chance defense recognized by the Circuit Court (Maryland Declaration of Rights Articles 5, 19, 20, 23, and 24 - United States of America Constitutional Amendments 7 and 14) were violated by Maryland's common law of Contributory Negligence.

F6) Whether or not Maryland's common law of

Contributory Negligence is unconstitutional.

F9) Whether or not the common law of Contributory Negligence could encourage and enable a Defendant by conspiring to commit fraud to evade liability for Petitioner's/Plaintiff's injuries and thereby deprive him of a fair trial.

F10) Whether or not this Court should replace Maryland's common law of Contributory Negligence with the principles of Comparative Negligence.

5. The COSA stated that it could not answer these questions in Appendix F of Petition No. 04-1676 at page App. 9. Therefore, **the COA was Campbell's state court of last resort**.

6. Campbell subsequently failed to file a COSA Brief of Appellant by the March 23, 2005 deadline and his COSA appeal was dismissed on April 13, 2005. However, the COSA was not the state court of last resort and this Court still has jurisdiction to consider Campbell's legal questions via a Conditional Cross-Petition for Writ of Certiorari to the COA.

7. Petitioner herein filed a timely Petition in this Court which was put on the docket on June 14, 2005. Respondent Campbell has until 11:59 pm on July 14, 2005 to file a Conditional Cross-Petition for Writ of Certiorari to the COA.

8. Rather than filing a Brief in Support or Brief in Opposition to Petitioner's Petition No. 04-1676 now before

this Court, Campbell filed a waiver June 30, 2005 which this Court put on the docket July 6, 2005.

9. This motion by Petitioner has met the 11:59 pm July 14, 2005 deadline in accordance with Supreme Court Rule 12.5 though Petitioner doubts that a Campbell Conditional Cross-Petition will be filed to meet this same deadline. Campbell's settlement agreement in BGE's interest which Petitioner alleges exists forbids Campbell from filing a timely Conditional Cross-Petition for Writ of Certiorari to the COA.

10. When the trial judge granted the J. N. O. V., Campbell was not the only one who lost. The 7th Amendment of the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

11. If the trial judge's J. N. O. V. was erroneous, the members of the jury were disenfranchised when they voted on their verdict. Hopefully, disenfranchised is used properly here. If not, Petitioner's meaning should still be adequately conveyed.

12. Since the 7th Amendment was included in the Bill of Rights as a protection against judges abusing their power, its effect is to restrain a government and limit governmental abuse of its citizens.

13. Therefore, Campbell alone did not lose by an

erroneous J. N. O. V. The jury and all United States citizens lost if the J. N. O. V. was erroneous.

14. Because this issue is so fundamental to all United States citizens, the jury should be contacted and informed that their verdict is in jeopardy. They were not present for the J. N. O. V. and could not defend their verdict properly.

15. Petitioner attempted to view the December 4, 1991 Voir Dire Sheet containing prospective jurors and the December 13, 1991 Jury Verdict Sheet signed by the Forewoman. (The December 4, 1991 Campbell, supra, trial transcript indicates that prospective jurors 1, 2, 4, 18, 30, 35, 50, 58, 61, 65, 79, 85, 93, 110, 121, and 122 were struck.)

16. The Circuit Court of Baltimore City and the Maryland State Archives have misplaced five parts of the Campbell, supra, Record which include everything prior to December 20, 1991. The Jury Verdict Sheet contained in the 1992 COSA Record Extract is not a copy of the signed Jury Verdict Sheet. Specifically, the December 4, 1991 Voir Dire Sheet and the December 13, 1991 signed Jury Verdict Sheet have been misplaced.

17. Petitioner has been working with the Circuit Court of Baltimore City file clerks and the personnel of the Maryland State Archives to no avail since he received Campbell's waiver in an effort to contact the Campbell, supra, Forewoman and/or any jury member to intervene and file a Conditional Cross-Petition for Writ of Certiorari to the COA.

WHEREFORE, Petitioner moves this Honorable Court to

Order or Compel the retired trial judge and parties present at the December, 1991 trial of Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, a body corporate to provide this Court with the December 4, 1991 Voir Dire Sheet containing prospective jurors and the December 13, 1991 Jury Verdict Sheet signed by the Forewoman. Further, Petitioner moves this Honorable Court to appoint counsel to contact the actual Campbell, supra, jury to inform them that their unanimous jury verdict of December 13, 1991was nullified by the trial judge in what the Court of Appeals of Maryland Petitioner Campbell and Respondent Campbell herein has alleged was an erroneous J. N. O. V. Finally, Petitioner moves this Honorable Court to extend leave for the jury to intervene in order to defend their December 13, 1991 verdict and file a Conditional Cross-Petition for Writ of Certiorari to the Court of Appeals of Maryland.

Respectfully Submitted,

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pre se
3114 Borge Street
Oakton, Virginia 22124
(703) 591-4662

APPENDIX NN

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202)-479-3011

July 19, 2005

Mr. Gregory Shawn Mercer
3114 Borge Street
Oakton, VA 22124

Re: Gregory Shawn Mercer
v. William Aloysious Thomas, III, et al.
No. 04-1676

Dear Mr. Mercer:

The "motions" received July 15, 2005, are herewith returned. This court does not appoint counsel prior to granting a petition for writ of certiorari and setting a case for oral argument. Nor does this Court compel the production of documents or extend leave for parties to intervene. The petitioner is responsible for appending lower court documents to the petition for a writ of certiorari, and a party seeking to intervene must file a motion for leave to intervene.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

s/ Christopher W. Vasil
Christopher W. Vasil
Chief Deputy Clerk

cc: Robert B. Campbell
Barbara A. Gaughan
David F. Grimaldi

APPENDIX OO

Document 1

[Maryland State Archives Letterhead]

MARYLAND STATE ARCHIVES

July 26, 2005

Greg Mercer
3114 Borge Street
Oakton, Virginia 22124

Dear Mr. Mercer:

Thank you for your inquiry. This letter confirms that the staff of the Maryland State Archives has reviewed its holdings regarding:

BALTIMORE [CITY] CIRCUIT COURT
(Civil Papers, Equity and Law)
MSA T2691
Dates: 1987
Box No.: 399
Description: Case Number 87323051, Bobby Campbell vs. BG&E
Accession No.: 2000/04/03
MSA No.: T2691-2026
Location: HF/8/35/20

A file for this case was located. The folder located is labeled Part VI. The first document enclosed is dated December 20, 1991. No other materials for this case have been located at the Archives.

Sincerely,

s/ Michael McCormick
Michael McCormick
Director of Reference Services

Hall of Records
350 Rowe Boulevard, Annapolis, MD 21401
Telehone: 410-260-6400
MD Toll Free: 800-235-4045
Fax: 410-974-3895
TTY users call MD Relay
Internet address: http://mdsa.net
e-mail address: archives@mdarchives.state.md.us

Document 2

MSAREF.NET, MSA SC 5458
An Archives of Maryland Publication

| >Edit & Modify Entries | > Search |
> Search MAILREF | > Contact Webmaster |
> Home | >End Session

MSA SC 5458-49-5944

Dates: 2005/1/20
Description: Pat Henry
Baltimore City Circuit Court
Family Division, Room 109
111 N. Calvert Street
Baltimore, MD 21202
410.333.3704

BCCC, T-2691, Civil Papers
Campbell Jr. vs. Balt. Gas & Electric,
Case #87323051 / CL 73959
Box 399, HF/8/35/20

Pull file to be sent to court. Mark Weygandt

2005/1/24 File pulled and UPS to court. ChrisD

Accession No.: MSA SC 5458-49-5944

Date Entered: 01/20/2005
Date Completed: 01/24/2005
No. Pages: 1
Amount paid: $0.00
Amount due: $0.00
Tracking No.: T 05-12006

Link to corresponding MAILREF record 05-12006

Notes Edit Database Entry

| >Edit & Modify Entries | > Search |
> Search MAILREF | > Contact Webmaster |
> Home | >End Session

System design by Dr. Edward C. Papenfuse and Nancy Bramucci. Programmed in *Microsoft SQL Server 7.0* and *Cold Fusion 4.0* by Nancy Bramucci. Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Greg Lepore. Version 2.3

http://msaref.net/description.cfm?item=5944&serno=49
1/24/2005

Document 3

RUN DATE: 07/27/2005

STATE COURT OF SPECIAL APPEALS
EVENT DESCRIPTION UPDATE SCREEN

CASE TITLE: ROBERT B. CAMPBELL, JR. VS. BG&E
TRM/CASE#: 2004 01932

LINE CONTROL	TRAN CODE	PR/ CODE	ENTRY DATE	COMMENT DESCRIPTION
0019.00	BLNK	P	20050413	
0020.00	MAND	P	20050513	Mandate issued
0021.00	COMM		20050517	Record in basement. plg
0022.00	COMM		20050711	Full case record prepared / sent to Cir. Ct. mg

END OF DATA P / N PAGE 0002

CERTIFIED TRUE COPY:
Leslie D. Gradet, Clerk
Court of Special Appeals

Document 4

Circuit Court for Baltimore City
Frank M. Conaway, Clerk
Civil Division, Room 462
111 North Calvert Street
Baltimore, Maryland 21202

July 29, 2005

Mr. Greg Mercer:

Thank you for your inquiry. This letter confirms that the staff of the Circuit Court for Baltimore City has reviewed its holdings regarding Case Number 24-C-87-323051 / CL73959.

On January 24, 2005, the Maryland State Archives sent the Circuit Curt for Baltimore City what it had as the archived file for **Campbell vs BG & E**. The returned file from the Maryland State Archives consisted of a folder labeled Part VI with the first document enclosed dated December 20, 1991. On July 11, 2005, the Court of Special Appeals returned to the Circuit Court for Baltimore City seven brick binders with documents filed on or after August 24, 2004 for the above mentioned case. Included in the seven volumes is a copy of the complete trial transcript from December 3, 1991 to December 13, 1991.

The Circuit Court for Baltimore City has made an extensive search since July 8, 2005. No other materials for

this case have been located at the Circuit Court for Baltimore City.

Sincerely,

s/ Tanya Holt
Tanya Holt
Civil Manager

APPENDIX PP

No.

IN THE SUPREME COURT OF THE
UNITED STATES

In re GREGORY SHAWN MERCER, Petitioner

On Petition for Writ of Certiorari
to the Court of Appeals of Maryland

APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

GREGORY SHAWN MERCER, PRO SE
Counsel of Record
3114 Borge Street
Oakton, Virginia 22124
(703)-591-4662

Filed: August 1, 2005 Received: August 2, 2005

TABLE OF AUTHORITIES

28 U.S.C. § 1257(a) [App. 170]

28 U.S.C. § 1651(a) [App. 170]

Amendment VII to the U. S. Constitution [App.171]

In re Leaf Tobacco Board, 222 U.S. 578 (1911) [App. 170]

Zipes vs. Trans World Airlines, Inc., 455 U.S. 385, 390 (1982) [App. 170 - 171]

To the Honorable William H. Rehnquist, Chief Justice of the Supreme Court of the United States and Circuit Justice for the State of Maryland.

Petitioner Gregory Shawn Mercer prays for a 60-day extension of time to file his Petition for Common-Law Writ of Certiorari in this Court to and including August 11, 2005. The final judgment in Robert B. Campbell, Jr. vs. Baltimore Gas and Electric Company, the Court of Appeals of Maryland (hereafter "COA"), September Term 2004, Petition Docket No. 490, was entered on December 23, 2004. A petition for rehearing (Motion for Reconsideration) in Campbell, supra, was denied March 14, 2005. Likewise, the final judgment in Gregory Shawn Mercer vs. William Aloysious Thomas, III, the COA, September Term 2004, Petition Docket No. 434, was entered on December 23, 2004. A petition for rehearing (Motion for Reconsideration) in Mercer, supra, was denied March 14, 2005. Both COA petitioners requested to be joined to the other petitioner in their COA petitions. The Mercer, supra, petition was filed October 27, 2004. The Campbell, supra, petition was filed December 2, 2004. The COA joined these petitions and issued common final

judgments on the same day [Appendix RR at App. 177]. The final judgments of the COA [were] identical for both cases on December 23, 2004, "denied as there has been no showing that review by certiorari is desirable and in the public interest." See [Appendices J, K, V, & W at App. 18, 19, 52, & 53].

Petitioner Mercer (hereafter "Mercer") filed Petition No. 04-1676 in this Court on Monday, June 13, 2005 and made Respondents Robert B. Campbell, Jr. (hereafter "Campbell") and Baltimore Gas and Electric Company (hereafter "BG&E") parties. Petition No. 04-1676 was put on the docket of this Court on June 14, 2005. Campbell did not file a Petition in this Court by his 90-day deadline. However, in accordance with Supreme Court Rule 12.5, Campbell had until July 14, 2005 to file a Conditional Cross-Petition having been named a Respondent. Guessing that BG&E had settled with Campbell without alerting Mercer to prevent Campbell from helping Mercer's cause in this Court, Mercer (pro se) filed a Motion on July 14, 2005 almost at the last minute, literally. See Appendix [MM at App. 151]. Campbell did not file a Conditional Cross-Petition. The Motion was returned to Mercer by the Clerk of this Court on July 21, 2005. See Appendix NN at [App. 159].

In accordance with 28 U.S.C. §§ 1257(a) & 1651(a) and In re Leaf Tobacco Board, 222 U.S. 578 (1911), Mercer can file a Petition for Common-Law Writ of Certiorari. Portions of this common-law writ have been pre-drafted in Mercer's Reply to Brief in Opposition, Petition No. 04-1676, distributed to this Court's justices the week of July 25, 2005. Unlike Zipes vs. Trans World

Airlines, Inc., (hereafter "TWA") 455 U.S. 385, 390 (1982) where all parties were aware of settlement negotiations and petitions to this Court might have been moot if settlement agreements were reached with TWA, Mercer was not aware of settlement negotiations between Campbell and BG&E. The fact of whether Campbell settled with BG&E is actually irrelevant as Campbell's decision not to file a Petition or Conditional Cross-Petition in this Court serves BG&E's interest isolating Mercer. For whatever reason Campbell did not file these petitions, Mercer was surprised and now has a weakened standing to have this Court review Campbell, supra.

However, the 7th Amendment of the United States Constitution gives a wonderful standing to the jury in Robert B. Campbell, Jr. vs. Baltimore Gas and Electric, a body corporate, Circuit Court for Baltimore City, Maryland, Case No. 87323051 / CL73959, December 4-13, 1991. See Petition No. 04-1676, Appendix M [at] App. 22 - 27. The Baltimore City trial judge excused the jury after its verdict and subsequently reexamined the jury verdict granting a Judgment Notwithstanding the Verdict (hereafter "JNOV"). [See Appendix M at App. 27 - 29]. The 7th Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Mercer has attempted to find [out] the identity of the members of the Campbell jury. Through accident or design, the Maryland State Archives (hereafter "MSA") has only the 6th folder of the original Circuit Court case. In the misplaced or destroyed five previous folders are the December 4, 1991 Voir Dire Sheet with prospective jurors names and the December 13, 1991 Jury Verdict Sheet signed by the Forewoman. See Appendix [OO at App. 161], document 1. The MSA sent the folder labeled "Part VI" back to the Circuit Court on January 24, 2005. See Appendix [OO at App. 163], document 2. The Court of Special Appeals of Maryland (hereafter "COSA") returned the record from Campbell's Maryland Rule 2-535(b) Motion for Revisory Powers back to the Circuit Court on July 11, 2005. See Appendix [OO at App. 165], document 3. The Circuit Court found just what the MSA and the COSA had sent it. Nothing further. See Appendix [OO at App. 166], document 4. There is no current public record of the identity of the members of the Campbell jury from 12/4/91 to 12/13/91.

The point of Campbell's COA Petition of December 2, 2004 was that the JNOV granted by the Baltimore City trial judge was erroneous because the jury could have followed the jury instructions based on the evidence presented and determined that Campbell's steadying [of] an unextended 40-foot ladder approximately 8 feet below a power line was ***not a cause*** of his injury. The foreman's extension of the ladder into the power line was ***the proximate cause*** of Campbell's injury. The foreman had been warned by the company owner just two hours earlier to watch for power lines. While Campbell was

Contributorily Negligent as a matter of law, Campbell should still have been able to recover the $4.85 million jury award from BG&E and the company he worked for jointly and severally because *Campbell's Contributory Negligence was not a cause of his injury*. Yet the trial judge violated the 7th Amendment using a Contributory Negligent common law as justification. Herein lies the question presented for review in Mercer's Petition No. 04-1676, **"Whether or not any contributory negligence common law is unconstitutional."**

Mercer's motion (Appendix [MM at App. 151]) advocates 1) identifying the jurors, then 2) appointing them counsel, then 3) having the jury's counsel move to intervene in Campbell, supra, then 4) having the jury's counsel petition for a writ of certiorari. This Court's Clerk's 7/19/05 letter (Appendix NN at [App. 159]) establishes that the correct order of these steps must be 1) petitioning this Court for a writ of certiorari, then 2) appointing counsel for the jury, then 3) having the jury's counsel move to intervene in Campbell, supra. The actual identity of the jurors is not relevant in hindsight.

WHEREFORE, Petitioner herein, Gregory Shawn Mercer, applies for an extension of the 90-day period to Petition to this Court after Campbell vs. BG&E, COA, September Term 2004, Petition Docket No. 490. The extension to 150 days would set the deadline of 11:59 pm on August 11, 2005 which is 10 days in the future. The Caption of the Petition will be *In re* Gregory Shawn Mercer, [Petitioner] and will ask this Court to appoint counsel for the Campbell jury in order to give the jury an

opportunity to intervene in this matter and defend their unanimous verdict in accordance with the 7th Amendment.

Respectfully Submitted,

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pre se
3114 Borge Street
Oakton, Virginia 22124
(703) 591-4662

APPENDIX QQ

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

August 3, 2005

Gregory Shawn Mercer
3114 Borge Street
Oakton, VA 22124

Re: Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company

Dear Mr. Mercer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case was received August 1, 2005. The application is returned for the following reason(s):

Only a party to the proceeding in the court whose judgment is sought to be reviewed may file documents in this Court. Rule 12.6.

At any rate, the application would be out-of-time. The date of the lower court judgment or order denying a timely petition for rehearing was March 14, 2005. Therefore the application for an extension of time was due on or before June 12, 2005. Rule 13.1 [sic. - 13.3], 30.1

and 30.2. When the time to file a petition for a writ of certiorari [in] a civil case has expired, the Court no longer has the power to review the petition or to consider an application for an extension of time to file the petition.

Sincerely,
William K. Suter, Clerk
By

s/ Jeffrey Atkins
Jeffrey Atkins
(202)-479-3263

Enclosures
cc: Robert B. Campbell, Jr.
David F. Grimaldi
Barbara A. Gaughan

APPENDIX RR

[Court of Appeals of Maryland Letterhead]

COURT OF APPEALS OF MARYLAND

Robert C. Murphy Courts of Appeal Building
361 Rowe Boulevard
Annapolis, Md. 21401-1699

410-260-1500
1-800-926-2583

MEMORANDUM

To: All Judges

From: Alexander L. Cummings [Initialed ALC]

Date: December 8, 2004

Re: Robert B. Campbell, Jr. v. Baltimore Gas & Electric Company
Petition Docket No. 490, Sept. Term, 2004

In the cert. envelopes dated December 2, 2004 to be taken up by the Court during Bar Admissions, there is a pro se petition entitled Mercer v. Thomas, Petition Docket No. 434, September Term 2004. Mercer requested that a cert. petition recently filed in Campbell v. BGE be joined

with the Mercer petition for consideration by the Court at the same time.

Attached hereto is the Campbell petition.

ALC/cg
Attachment

TTY FOR DEAF: 410-260-1554

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland
By: s/ Carol A. Greenstein Deputy Clerk

APPENDIX SS

3114 Borge Street
Oakton, Virginia 22124
August 10, 2005 [Filed]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

RE: My August 1, 2005 Application for Extension of Time to File a Petition for Common-Law Writ of Certiorari for *In re* Gregory Shawn Mercer, Petitioner

Dear Honorable William K. Suter,

This letter attempts to be in accordance with Rules 22.4 & 30.4. There may not be a Rule for the aggrieved party to consult when an Application to an individual Justice for Extension of Time to File a Petition for Writ of Certiorari is denied in the first instance by the Clerk. However, as the aggrieved party I believe my Application has been denied by the Clerk via Jeffrey Atkins erroneously. My Application was denied by Mr. Atkins for two reasons (See Appendix [QQ at App. 175]):

> First, the Court of Appeals of Maryland had not consolidated Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company and Gregory Shawn Mercer v. William Aloysious Thomas, III.

Therefore, the caption for Campbell, supra, does not reflect me as a Party to the Record.

Second, Mr. Atkins concluded my Application for Extension of Time was untimely in accordance with Supreme Court Rule 30.2 because th application was not filed 10 days before June 12th, 2005.

THE COURT OF APPEALS OF MARYLAND JOINED THE CASES

The first reason for denial should be rectified with evidence that these cases were joined by the Court of Appeals of Maryland (See Appendix [RR at App. 177]). The Maryland Courts progress from District Court to Circuit Court to Court of Special Appeals of Maryland to Court of Appeals of Maryland (hereafter "DC," "CC," "COSA," and "COA" respectively). The Maryland Rules to consolidate cases in the DC and CC are Rule 3-503 and 2-503 respectively. ***There is no Maryland Rule to consolidate cases in the COSA or COA***. Maryland Rules 3-503, 2-503, 8-401, 8-421, & 8-503 may be of interest and state:

> Title 3 - Civil Procedures - District Court:
> **Rule 3-503. Consolidation; separate trials.**
> (a) *Consolidation*. (1) When permitted. When actions involve a common question of law ... (2) Transfer to the circuit court for consolidation.
> ...
> (b) *Separate trials*.

Title 2 - Civil Procedures - Circuit Court:

Rule 2-503. Consolidation; separate trials.

(a) *Consolidation.* (1) When permitted. When actions involve a common question of law ... (2) Verdict or Judgment. In the trial of a consolidated action, the court may direct that joint or separate verdicts or judgments be entered.

(b) *Separate trials.*

Title 8 - Appellate Review in the Court of Appeals and Court of Special Appeals:

Rule 8-401. Parties – Joinder and substitution.

(a) *Joinder not required.* A petition for writ of certiorari, an appeal, or an application for leave to appeal may be filed with or without the assent or joinder of coplaintiffs, codefendants, or other parties.

(b) *Substitution.* The proper person may be substituted for a party on appeal in accordance with Rule 2-241.

Rule 8-421. Docketing of appeals.

(a) *Generally.*

(b) *Separate appeals on the same record.* All appeals on the same record, whether in the same action or in two or more actions consolidated in the lower court, shall be docketed as one action on appeal.

Rule 8-503. Style and form of briefs.

FROM THE COURT OF APPEALS OF MARYLAND PETITIONS

1) Mercer v. Thomas, Petition Docket No. 434, COA Petition stated in Section I, page 19:

"In accordance with Rule 8-401(a) and because the issues in this Petition are so similar to the issues in Robert B. Campbell, Jr. v. Baltimore Gas & Electric Co., Case No. 87323051 / CL73959, **currently** in the Circuit Court for Baltimore City, Maryland, Petitioner herein seeks to join his Petition with any Campbell Petition in the future. Campbell, supra, is a case previously litigated in 1991 where a jury, likely with an attorney on it named Pauline Olsen, returned a favorable verdict for Campbell. The Judge missed the inference that the verdict was a Last Clear Chance verdict. A Last Clear Chance argument had been presented directly to the Judge when the jury had not been present and before the jury verdict. Subsequent to the jury verdict, the Judge granted a Judgment N. O. V. for defendant BG&E which erroneously stripped the $4.85 million Last Clear Chance jury award from Campbell. Petitioner believes the State of Maryland would benefit if both of these Petitions were heard together in the Court of Appeals of Maryland.

As of October 18, 2004, Campbell's Motion to Alter or Amend a Judgment - Court Decision with Opposition's Response had been forwarded to the Baltimore City Circuit Court Judge, the Honorable Carol E. Smith, for a ruling. Plaintiff Campbell has informed Petitioner of a desire to

immediately file a Notice of Appeal quickly followed by a Petition to the Court of Appeals if his Circuit Court Motion to Alter or Amend is denied. Also, Petitioner has been informed that Plaintiff Campbell hopes to help join the two potential Petitions in the Court of Appeals by his own efforts. At present, Plaintiff Campbell still awaits his final Order from the Baltimore City Circuit Court."

2) Campbell v. BG&E, Petition Docket No. 490, COA Petition stated in Section I, pages 20-21:

"In accordance with Rule 8-401(a) and because the issues in this Petition are so similar to the issues in Gregory Shawn Mercer v. William Aloysious Thomas, III, Petition No. 434, September Term 2004, Petitioner herein seeks to join his Petition with Petitioner Mercer's Petition. Mercer, supra, arose from a case previously litigated in 1998, CAL94-21066, where a jury found Petitioner Mercer Contributorily Negligent. Thereafter, in 2002, Petitioner Mercer properly discovered Respondent Thomas' truthful, insurance statement which exposed fraud in Respondent Thomas' 1997 deposition and 1998 trial, deposition testimony. But for Respondent Thomas' fraud in the trial of CAL94-21066, Petitioner Mercer alleges he would have been able to defend against Respondent Thomas' Contributory Negligence allegation with a Last Clear Chance defense and recovered.

Petitioner Mercer re-sued Respondent Thomas alleging fraud, CAL03-02711, and elected a jury trial. The Judge in CAL03-02711 dismissed Petitioner Mercer's Complaint due to a 3-year statute of limitations which began from Respondent Thomas' 1998 trial, deposition testimony and not from Petitioner Mercer's proper 2002 discovery of Respondent Thomas' truthful, insurance statement. Petitioner Mercer alleges he used ordinary diligence to discover Respondent Thomas' truthful, insurance statement prior to 2002 and the 3-year statute of limitations should end in 2005. Petitioner Mercer's elected right to a jury trial for injuries to his person and right to equal protection of the law which should allow him to argue his case with a Last Clear Chance defense are alleged to have been violated. Petitioner herein believes the State of Maryland would benefit if both his appeal and Petitioner Mercer's appeal were heard together in this Court."

PETITIONER HAS GOOD CAUSE AND EXTRAORDINARY CIRCUMSTANCE

My Application for Extension of Time was not untimely. However, *if Mr. Campbell had filed a similar Application on August 1st, his Application would have been untimely*. The 90th day for Mr. Campbell was Sunday, June 12th and *I expected* he would either join me or file his own Petition on or before June 13th with me. Though I encouraged him, he did neither of these. Hopefully, I named Mr. Campbell as a Respondent in Mercer v. Thomas, et al., No. 04-1676, which I filed and

this Court docketed on June 14th. Mr. Campbell then had until July 14th to file a Conditional Cross-Petition. He did not file a Conditional Cross-Petition though *I expected he would.*

I was surprised that Mr. Campbell abandoned his opportunity to go to the Supreme Court. In hindsight, there is a very good possibility that a settlement agreement exists between Respondents BG&E and Mr. Campbell to isolate me in the Supreme Court. Mr. Campbell had the opportunity to file a Petition in this Court twice and failed to do so. But I had no prior knowledge of what Mr. Campbell was going to fail to do. *I could not know the need to file an Application for an Extension of Time in Campbell's case if I expected him to file his own Petition for Writ of Certiorari to the COA on or before July 14th, 2005.*

As July 14th approached, I considered the possibility of a settlement between Respondents BG&E and Mr. Campbell. Before this deadline passed I filed a Motion to Order or Compel [to determine identity of the Campbell v. BG&E jury members] / Motion to Appoint Counsel for Jury / Motion to Extend Leave for Jury to Intervene and File a Conditional Cross-Petition for Writ of Certiorari (See Appendix [MM at App. 151]). This is in accordance with the 7th Amendment. My Motion was denied and returned by the Clerk in the first instance via Chief Deputy Clerk Christopher W. Vasil (See Appendix NN [at App. 159]).

Mr. Vasil stated this Court does not Order or Compel nor Appoint Counsel prior to a Petition being granted and scheduled for Oral Argument. This meant a Petition needed to be filed prior to counsel being appointed for the jury. I decided to use my standing as a joined COA party in Campbell v. BG&E to file a Petition for Common-Law Writ of Certiorari (*In re* Gregory Shawn Mercer, Petitioner). Campbell, supra, and Mercer, supra, share identical COA judgments, "denied as there has been no showing that certiorari is desirable and in the public interest." According to *In re* Leaf Tobacco Board, 222 U.S. 578 (1911), "One who is not a party to the record and judgment is not entitled to appeal therefrom."

As the 150th day after Campbell's COA petition for rehearing (Motion for Reconsideration) was denied (March 14, 2005) is August 11, 2005, I filed an Application to Chief Justice Rehnquist for Extension of Time to File Petition for [Common-Law] Writ of Certiorari to the Court of Appeals of Maryland on August 1st, 2005. This is in accordance with the 10-day requirement of Rule 13.5. My Application was denied and returned by the Clerk in the first instance via Jeffrey Atkins (See Appendix [QQ at App. 175]).

CONCLUSION

The COA used Maryland Rule 8-401(a) to join Mercer, supra, with Campbell, supra, before it issued identical judgments in each case. According to *In re* Leaf Tobacco Board, 222 U.S. 578 (1911), "One who is not a

party to the record and judgment is not entitled to appeal therefrom." I have standing to file a Petition for Common-Law Writ of Certiorari to the COA (*In re* Gregory Shawn Mercer, Petitioner).

I present an **extraordinary circumstance** to this Court in that I am attempting to make a jury a party before this Court in order that it may defend its unanimous verdict which a lower court reexamined and reversed after the jury was excused contrary to the 7th Amendment. I have **good cause** why my Application for Extension of Time to File Petition for [Common-Law] Writ of Certiorari to the Court of Appeals of Maryland was not filed 10 days prior to June 12th, 2005. *How could I know that Mr. Campbell would fail to file a Petition given two opportunities?* We stopped communicating shortly after January 21, 2005. I request my Application be sent to Chief Justice Rehnquist as soon as possible (Original and two copies enclosed). I will file the Petition as Appendix [TT at App. 189] to a Supplemental Brief in Mercer v. Thomas, et al., Petition No. 04-1676, filed on or before August 11, 2005. Respondents will have their full 30 days to file Briefs in Opposition after the Petition is docketed in accordance to Rule 15.3 if my Application is granted. *It would be an **extraordinary circumstance** if Respondent BG&E influenced or quietly settled with Respondent Campbell in order to evade review by this Court of a violation of the 7th Amendment to the United States Constitution.*

Respectfully submitted,

s/ Gregory Shawn Mercer

App. 188

Gregory Shawn Mercer, pro se
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APPENDIX TT

The document that follows is a Petition for Common- Law Writ of Certiorari to the Court of Appeals of Maryland in the case of Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, Petition Docket No. 490, September Term 2004. Appendices L - W, II - KK, & OO relate to Campbell, supra. *What more can one man do to change a bad law that hurts people?*

No.

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE GREGORY SHAWN MERCER, PETITIONER

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Maryland's highest court evaded federal questions in cases/appeals involving contributory negligence.

2. Whether or not the common law of contributory negligence can encourage and enable a Defendant by committing fraud to evade liability for Plaintiff's injuries and thereby deprive Plaintiff of a fair trial.

3. Whether or not the Trial Court's Judgment NOV was an irregularity subject to Maryland Rule 2-535(b) because the Trial Court ought to have recognized Campbell could steady the unextended ladder below the power line for a longer time without electrocution as long as the foreman or anyone else didn't extend the ladder up and into the power line which was the proximate cause of Campbell's injuries.

4. Whether or not Maryland's contributory negligence common law was used to violate Campbell's 7th U. S. Amendment right to preservation of a jury trial and Campbell's 14th U. S. Amendment right to due process / equal protection of the law.

5. Whether or not any (including Maryland's and West Virginia's) common law of contributory negligence is unconstitutional.

PARTIES TO THE PROCEEDING BELOW*

Petitioner, Plaintiff, Appellant is Gregory Shawn Mercer.

Respondent, Plaintiff, Appellant is Robert B. Campbell, Jr.

Respondent, Defendant, Appellees are Baltimore Gas and Electric Company, a body corporate and William Aloysious Thomas, III.

* The parties come before this Court from prior and separate litigation originating as Mercer v. Thomas, Case No. CAL 03-02711, in the Circuit Court for Prince George's County, Maryland, and Campbell v. BG&E, Case No. 24-C-87-323051, in the Circuit Court for Baltimore City, Maryland. Both Plaintiffs lost their cases in the Circuit Courts and appealed to the Court of Special Appeals of Maryland (hereafter COSA).

Mercer lost in the COSA and filed a Petition for Writ of Certiorari to the COSA in the Court of Appeals of Maryland (hereafter COA) on October 27, 2004. Campbell used Maryland Rule 8-302(a) to appeal from the COSA directly to the COA without waiting for a COSA Opinion. Campbell filed his Petition for Writ of Certiorari to the COSA in the COA on December 2, 2004.

Both Mercer and Campbell expressed an interest in having their Petitions joined in the COA. The COA denied both these Petitions for Writ on the same day, December 23, 2004, giving the substantive grounds for each that "there has been no showing that review by certiorari is desirable and in the public interest." Subsequent Motions for Reconsideration were filed by both Mercer and Campbell on January 21, 2005 and were denied on the same day, March 14, 2005.

Petitioner, herein, seeks review of a COA Order where two Petitions were joined (See Petition 04-1676, Appendix RR at App. 177 - App. 178). As a consequence, Petitioner has named the joined parties from the COA as Respondents to this Petition in accordance with Supreme Court Rules 12.4 to 12.6.

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PETITION FOR WRIT OF CERTIORARI

Gregory Shawn Mercer v. William Aloysious Thomas, III (Petition Docket No. 434, September Term 2004) in the Court of Appeals of Maryland (hereafter "COA") was joined with Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company (Petition Docket No. 490, September Term 2004) in the COA on or before December 23, 2004. See Mercer v. Thomas, et al., Petition No. 04-1676, *Appendix RR* at App. 177 (hereafter *Appendix RR* at App. 177). The Campbell, supra, Petition requested to be joined to Mercer, supra, on pages 20-21. The Mercer, supra, Petition requested to be joined to Campbell, supra, on page 19. On December 23, 2004, the COA issued identical judgments in both cases that day, "... denied as there has been no showing that review by certiorari is desirable and in the public interest." A joined party issued the same judgment, Gregory Shawn Mercer respectfully petitions for a **common-law writ of certiorari** to review the Order of the COA in Campbell, supra.

CAMPBELL v. BG&E OPINIONS

The Order of the COA in Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company (Petition Docket No. 490, September Term 2004, December 23, 2004) is reprinted in its entirety at *Appendix V* (App. 52). Because the questions presented to the COA concerned a critical review of the fairness and justness of Maryland's contributory negligence common law and the COSA could not consider these questions (See *Appendix F* at App. 9),

the Order of the COA was a final judgment from the Maryland Court of last resort. A Notice of Appeal to the COSA was filed November 8, 2004 (*Appendix JJ* at App. 126). Campbell did not pursue a COSA Opinion in this case subsequent to November 8, 2004 because the COSA was not the Maryland court of last resort. Campbell's COSA appeal was dismissed April 13, 2005. The Order of the Circuit Court for Baltimore City, Maryland (Case No. 24-C-87323051 / CL73959, September 16, 2004) is reprinted in its entirety at *Appendix T* (App. 50). The Order of the Circuit Court for Baltimore City, Maryland to a Motion to Alter or Amend a Judgment - Court Decision (Case No. 24-C-87323051 / CL73959, November 3, 2004) is reprinted in its entirety at *Appendix U* (App. 51). An Order of the COA in the previous appeal of Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company (Petition Docket No. 117, September Term 1993, July 21, 1993 reported as 331 Md. 196, 627 A.2d 538 (1993)) is reprinted in its entirety at *Appendix Q* (App. 47). The previous Opinion of the COSA in Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company (No. 732, September Term 1992, February 1, 1993 reported as 95 Md. App. 86, 619 A.2d 213 (1993)) is reprinted in its entirety at *Appendix O* (App. 32). The previous Judgment of the Circuit Court for Baltimore City, Maryland (Case No. 87323051 / CL73959, December 13, 1991) is reprinted in its entirety at *Appendix N* (App. 30). The previous Opinion of the Circuit Court for Baltimore City, Maryland (Case No. 87323051 / CL73959, December 13, 1991), was transcribed and is reprinted in its entirety at *Appendix M* (App. 27). *Appendix M* (App. 22) is the

polling of the unanimous jury which was excused from the courtroom immediately preceded the 12/13/91 Opinion of Circuit Court (*Appendix M* at App. 27). That 12/13/91 Opinion granted a Judgment Notwithstanding the Verdict to Respondent BG&E after a jury pronounced its verdict in favor of Respondent Campbell and was excused from the courtroom. Petitioner herein alleges this was a violation of the 7th U. S. Amendment.

CAMPBELL v. BG&E JURISDICTION

To aid this Court's appellate jurisdiction, 28 U. S. C. § 1651(a) is invoked. In opposition to the 7th Amendment, the unanimous Campbell jury voted on a verdict and was disenfranchised. Petitioner uses his standing to petition this Court to appoint counsel for the unanimous Campbell jury (*Appendix M* at App. 22) to give it the opportunity to move to intervene.

The jury intervenor would seek this Court's review of the Order entered in Campbell v. BG&E on December 23, 2004, by the COA. The COA denied Respondent Campbell's Motion for Reconsideration by Order at *Appendix W* (App. 53) entered on March 14, 2005 and prior to Campbell missing the COSA deadline to file a Brief of Appellant, March 23, 2005. Additionally, the Jurisdiction of this Court would be invoked pursuant to 28 U. S. C. § 1257(a). In accordance with Hunter v. Ohio ex rel. Miller, 396 U. S. 879 (1969), the jurisdiction of this Court would likewise be invoked pursuant to 28 U. S. C. § 1257(a) which replaced 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV to the United States Constitution, section 1 provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Maryland, Declaration of Rights, Article 5 provides, in pertinent part:.

> (a) That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury,

> according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.
> (b) The parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors.

Constitution of Maryland, Declaration of Rights, Article 19 provides:

> That every man, for any injury done him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

Constitution of Maryland, Declaration of Rights, Article 20 provides:

> That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People.

Constitution of Maryland, Declaration of Rights, Article 23 provides:

> In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.
>
> The right to trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of $10,000, shall be inviolably preserved.

Constitution of Maryland, Declaration of Rights, Article 24 provides:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the Land.

28 U.S.C. § 1257(a) states:

State courts; certiorari
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1651(a) states:

Writs
The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Maryland Annotated Code, Article 89, §§ 58 - 61

§ 58. "High-voltage lines" defined.
For the purposes of this subtitle, "high-voltage lines" shall mean an electric line or lines which are installed above ground level, having a voltage in excess of 750 volts between conductors from any conductor to ground. For the purposes of this subtitle all electric lines are considered to be

energized at all times from and after installation or erection, and shall be assumed to be in excess of 750 volts until otherwise determined from owner or operator of such line. (1968, ch. 759).

§ 59. Duty of Employer to comply with § 60.
No person, firm or corporation shall perform, or require or permit any employee to perform, any act prohibited by § 60 hereof unless and until danger from accidental contact with high-voltage lines has been effectively guarded against in the manner prescribed in § 60. (1968, ch. 759).

§ 60. Activities prohibited near high-voltage lines without safeguards.
The operation, erection, handling, storage or transportation of any tools, machinery, equipment, supplies, materials, or apparatus, including but not limited to antennas, antenna supports, flagpoles, and other similar facilities, the moving of any house or other building or structure, or any part thereof, and the performing of tree trimming or activities of like nature, under, over, by or near high-voltage lines is hereby expressly prohibited, if at any time during the course thereof any part of any person or object will come or be brought within ten feet of any high-voltage lines, unless such high-voltage lines have first been effectively guarded against dangerous accidental contact, and appropriate protective arrangements shall have first been made with the owner or operator of such high-voltage

lines, by either:

1. The installation of physical barriers to prevent physical contact with such high-voltage lines; or
2. The relocation of such high-voltage lines, either laterally or vertically; or
3. The de-energizing of such high-voltage lines and the grounding of same; provided, however, that nothing herein shall be construed, or shall operate to impose upon any owner or operator of any high-voltage lines the duty or obligation to effect any such precautionary measure at his or its expense or to obligate any such owner or operator to de-energize or ground any high-voltage lines if service to the public would thereby be substantially interfered with or if the health, safety or welfare of the public would thereby be endangered. (1968, ch. 759).

§ 61. Activities within ten feet of high-voltage lines; duty of owners, etc., of cranes, etc.

(a) When any such operation, erection, handling, storage, transportation or moving is to be performed within ten feet of any high-voltage lines, the person or persons responsible for performing the same shall promptly notify the owner or oper. or of the high-voltage lines of the work to be performed and such person or persons shall be responsible for the provision, subject to any necessary agreement of the owner or operator of the high-voltage lines, of one

or more of the safety measures required by § 60 of this article before proceeding with any work within said ten feet.

(b) Upon notification and appropriate arrangements being made by such person or persons, and within a reasonable time thereafter under all the circumstances involved, the owner or operator of the high-voltage lines shall perform such acts as are reasonably necessary for such owner or operator to perform, as set forth in and subject to the provisions of § 60 hereof, to guard against danger from accidental contact.

(c) It shall be the duty and responsibility of the owner, lessee or employer of any equipment, including but not limited to cranes, derricks, power shovels, trimming rigs, pile drivers or similar apparatus, any part of which may be used near any high-voltage lines, to:

(1) Acquaint themselves and their employees with this law and the rules and regulations prescribed and promulgated pursuant to § 62 hereof, and:

(2) Post and maintain in clear view of the operators of such equipment a permanent, weather resistant warning sign, legible at 12 feet, reading "unlawful to operate this equipment within 10 feet of any electric wire." The warning sign required in subsection (c)(2) shall be:

(1) Placed in clear view of the operator when he is at the controls of

the equipment;
(2) Placed on the boom of any crane or derrick so that when the boom is raised, the sign is at the eye level of the operator; and
(3) Placed on the outside of all equipment so that it is in clear view of any person assisting the operator from outside the equipment. (1969, ch. 759; 1973, ch. 121).

In accordance with Supreme Court Rule 33.1(d), this Petition contains verbatim text and may be 37 and a half pages long.

STATEMENT OF CASES

Campbell v. BG&E (App. L - W, II - KK, & OO):

Maryland Rule 2-535(b) - **Revisory power**.
(b) *Fraud, mistake, irregularity*. On motion of any party filed **at any time**, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Campbell filed a Motion for Revisory Powers in the Circuit Court for Baltimore City (*Appendix T* at App. 50) on August 24, 2004.

On April 7, 1986, William P. Sieglein owned SRSC and had 35 years experience with siding installation. The company had two employees at that time. Mark S. Jenkins

was the SRSC foreman with 13 years experience working for SRSC and Robert B. Campbell, Jr. was supervised by this foreman. Jenkins was owner Sieglein's 32-year-old nephew and Campbell was 19-years-old at that time.

SRSC owner, as an employer, was required to notify BG&E whenever his employees would be working within ten feet of BG&E power lines (Maryland Annotated Code, Article 89, §§ 58-60).

Prior to April 7, 1986, the SRSC employer had examined 2 Bloomingdale Avenue and wrote an estimate for future work at the new work site without notifying BG&E that power lines, which were located in plain view, were 9 feet 10 inches from roof eaves on the house at that property. SRSC employees would be installing a form of siding called soffit under these eaves and fascia to the rake boards on the ends of these eaves (SRSC's Primary Negligence).

On April 7, 1986, both SRSC employees were reasonably expected to work within ten feet of BG&E's power lines located in plain view just outside or on the perimeter of this new work site yet the SRSC employer had not notified BG&E of these facts (More SRSC's Primary Negligence).

After arriving at 8:30 a.m. on April 7, 1986, the SRSC employer and the SRSC foreman walked around the job site discussing the work to be done while Campbell worked outside of hearing range setting up a work table. Campbell noticed power lines outside the fence around perimeter of the new job site. The employer warned his foreman to watch for these power lines while working and then the employer left the job site to estimate future work

at another job site (Primary Negligence situation of peril notice, Primary Negligence not concurrent with Contributory Negligence).

SRSC foreman supervised Campbell. At about 10:15 a.m., the foreman called Campbell over from the work table and directed Campbell to steady a 40-foot aluminum ladder just inside the fence around the perimeter of the job site and below BG&E power lines. The power lines were in plain view (Campbell did not assume the risk for his injury).

The SRSC employer was not at the work site at this time. The ladder was originally leaning against the house at the job site. The ladder was brought vertical and steadied with Campbell bracing himself against the fence. While Campbell steadied the ladder, the SRSC foreman pushed up on the ladder extension while looking upward toward the power lines located in plain view. The foreman pushed up on the extension with one of his feet on the ladder's lowest rung (Maryland Annotated Code, Article 89, §§ 58, 60-61 attached hereto - Campbell's Contributory Negligence, Contributory Negligence not concurrent with Primary Negligence, Last Clear Chance fresh opportunity of a considerable amount of time).

Campbell's Contributory Negligence was not causing any injury to this point as the ladder was being steadied by Campbell with the top of the ladder below all power lines. It was the next extension of the ladder by the SRSC foreman that would cause Campbell's injury (Campbell's Contributory Negligence was not a cause of injury).

SRSC foreman pushed up on the ladder a third time

while looking upward toward the line-to-ground, RMS, 7,600-volt power line located in plain view above with his feet on the second and third rungs of the ladder and until electrical contact was made between the power line and the top of the ladder. The SRSC foreman was not electrically grounded and jumped off the ladder while the Campbell suffered near fatal, severe, deforming injuries and burns throughout his body which have left him permanently disabled (Maryland Annotated Code, Article 89, §§ 58, 60-61 attached hereto - SRSC's Secondary Negligence, Secondary Negligence situation of peril notice).

In subsequent litigation but prior to trial, BG&E sued "William Sieglein t/a [trading as] Sieglein Roofing and Siding Company" and "Mark Jenkins".

The available Last Clear Chance defense that existed for the Campbell at the end of all evidence was:

a) SRSC employer was Primarily Negligent (Maryland Annotated Code, Article 89, §§ 58-60).

b) SRSC employer was aware of the Primary Negligence situation of peril and communicated a warning concerning this to the SRSC foreman.

c) Campbell was Contributorily Negligent (Maryland Annotated Code, Article 89, §§ 58, 60-61).

d) Campbell's Contributory Negligence by itself was not sufficient to cause his injuries.

e) Primary and Contributory Negligence were not concurrent so SRSC clearly made the original mistake.

f) SRSC foreman was Secondarily Negligent (Maryland Annotated Code, Article 89, §§ 58, 60-61).

g) Secondary Negligence was new and independent

of Primary Negligence.

h) SRSC foreman looked upward toward the line-to-ground, RMS, 7,600-volt power line which was located in plain view above while pushing up on the ladder extension and was aware of the Secondary Negligent situation of peril previously brought to his attention by the SRSC employer a couple hours earlier (Maryland Annotated Code, Article 89, §§ 58, 60, and 61).

i) The Last Clear Chance fresh opportunity was of a considerable amount of time as compared to 7.33 seconds in Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983) where a Last Clear Chance defense was used successfully.

Circuit Court instructed Jury twice. Once after it requested re-instruction while deliberating, Motion for Revisory Powers, page 4:

> 7. The jury received jury instructions, began deliberation, then requested to be re-instructed on Contributory Negligence:
>
> A Plaintiff cannot recover if his negligence is a cause of his injury. ... To ... be barred, the negligence must be a cause of an injury.
>
> A Plaintiff cannot recover if his negligence is a cause of his injury.

After Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983), any Maryland Jury was empowered to deliberate with the Last Clear Chance theory. The actual

Jury Verdict Sheet in Robert B. Campbell v. Baltimore Gas and Electric Company, Case No. 87323051 / CL73959, December 13, 1991 with the Jury findings (App. L & M) was:

1. Was BG&E negligent? Yes _X_ No ____
2. Was Robert Campbell contributorily negligent? If the answer to #2 is "no," then continue; if "yes," then stop.
   Yes ____ No _X_
3. Did Robert Campbell assume the risk of his injury? Yes ____ No _X_
4. Was Mark Jenkins negligent?
   Yes ____ No _X_
5. Was William Sieglein negligent?
   Yes _X_ No ____
6. In what amount do you award damages?
   $ 4,850,000

If the jury determined Campbell was contributorily negligent but not the cause of his injury and deserving of a jury award in accordance with the jury instructions, how would they answer question #2? The instructions after question #2 prevent the jury from continuing so as to be able to answer question #6 and give Campbell a jury award.

This Jury Verdict was a Last Clear Chance Jury Verdict:

> William Sieglein was most associated with SRSC in the trial due to BG&E suing "William P. Sieglein trading as Sieglein Roofing and Siding Company".

Sieglein's Motion Inlimini to prevent BG&E from referring to Sieglein the individual as the person responsible for notifying BG&E of the proximity of power lines to SRSC employees had been denied. SRSC foreman Mark Jenkins was not negligent, the company he worked for was negligent. Robert Campbell's Contributory Negligence was not a cause of his injury, SRSC foreman's pushing up to extend the ladder was the proximate cause of Campbell's injury in accordance with the Jury Instructions given two times. Robert Campbell had been directed by his supervising foreman to hold the ladder steady. Additionally, the Jury found BG&E to be negligent. Therefore, Campbell could have and should have recovered the Jury award from SRSC and BG&E jointly and severally.

The Jury Verdict Sheet ambiguous Question No. 2:

Was Robert Campbell contributory negligent?

Yes ___ No ___

To avoid ambiguity, the Jury Verdict Sheet Question No. 2 should have been:

Was Robert Campbell contributory negligent and, if so, was his contributory negligence a cause of his injuries?

Yes ____ No ____

At trial, there was prospective juror #3 who was a personal injury attorney, Pauline Olsen. Motion for Revisory Powers, pages 5-6:

14. Prospective Juror No. 3, attorney Pauline Olsen (spelled phonetically "Olson" in Transcript) [12/4/91 Trial Transcript pages 8, 43, 58, 63 - 64], was at the top of the juror list after Voir Dire but before the four trial counsel exercised their strikes (4 each). This prospective juror knew of Last Clear Chance theory. The Trial Judge informed counsel the jurors were to be seated starting from the top of the juror list [page 63].

Petitioner's Request for Jury Instructions included a Comparative Negligence Instruction, Request No. 16. The Circuit Court denied this instruction and Petitioner noted his exception:

If you find that plaintiff was negligent, and that his negligence contributed to his injuries, then you must determine the relative contributions (on a percentage basis) of the defendant BG&E's negligence and the plaintiff's negligence to those injuries and damages. Your assessment of the dollar value of the plaintiff's damages will then be reduced by the Court by the percentage which you attribute to the plaintiff's negligence.

Campbell's Trial Attorney, William F. Gately, presented Campbell's *last chance* defense to the Baltimore City trial judge while the jury had retired (*Appendix II* at App. 121). Despite this, the trial judge missed what the jury concluded after deliberation. The Jury had the evidence at presented to it that SRSC foreman Mark Jenkins was the one who pushed the ladder extension into the power line and caused Campbell's life threatening

injuries while Campbell passively had the ladder in the vertical position.

Maryland Rule 2-519(b & d) - **Motion for Judgment**.

> (b) *Disposition.* When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.
>
> (d) *Reservation of decision in jury cases.* In a jury trial, if a motion for judgment is made at the close of all evidence, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge the jury. For the purpose of appeal, the reservation constitutes a denial of the motion unless a judgment notwithstanding the verdict has been entered.

Maryland Rule 2-532(e) - **Motion for judgment notwithstanding the verdict (J. N. O. V.)**.

> (e) *Disposition.* If a verdict has been returned, the court may deny the motion, or it may grant the

> motion, set aside any judgment entered on the verdict, and direct the entry of a new judgment. If a verdict has not been returned, the court may grant the motion and direct the entry of judgment or order a new trial. If a party's motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for a new trial, if any, should the judgment thereafter be reversed on appeal.

Maryland Rule 2-535(b) - **Revisory power**.

> (b) *Fraud, mistake, irregularity.* On motion of any party filed **at any time**, the court may exercise revisory power and control over the judgment in case of fraud, mistake, or irregularity.

Campbell filed a Motion for Revisory Powers in the Circuit Court for Baltimore City (*Appendix T* at App. 50) on August 24, 2004. Petitioner attached a copy of this Motion for Revisory Powers to his Motion for Reconsideration in the COSA (*Appendix I* at App. 17).

The Circuit Court judge recognized it could not grant a J. N. O. V. if there was any way the Jury decision was reasonable, "no matter how slight," (*Appendix M* at App. 27 - 28) as did the COSA, "however slight," (*Appendix O* at App. 39)

REASON FOR GRANTING THE WRIT

First and foremost, does the Supreme Court have

jurisdiction. The Court of Appeals hasalready ruled on December 23, 2004. The sole appellate jurisdiction lies in this Court. "But where, as here, sole appellate jurisdiction lies in this Court, application for a common law writ in aid of appellate jurisdiction must be to this Court." United States Alkali Export Association, Inc. v. United States, 325 U. S. 196, 202 (1945). The jury has no representation, Campbell has failed to file a Petition, and BG&E wants this matter to die as it can only reduce BG&E's assets. As a joined party who shares the same judgment as Campbell, Petitioner has standing to petition this Court for a common-law writ of certiorari.

There was no communication between Campbell and Petitioner to alert Petitioner that Campbell would abandon his Supreme Court opportunity. In fact, Respondent BG&E would have preferred that Petitioner not be notified of settlement negotiations prior to deadlines.

The common-law writ is useful here "...because there are in issue important questions regarding the relation between the [Maryland Contributory Negligence law] and the [7th Amendment]." Far East Conference v. United States, 342 U. S. 570, 572 (1952).

Is there an independent and adequate state ground to keep the Supreme Court out of a matter involving a 7th Amendment right to a preserved jury trial. Certainly, Maryland Declaration of Rights Articles 5(b), 20, and 23 encourage the grant of the preserved jury trial.

The 7th Amendment gives the jury standing to defend its unanimous verdict (*Appendix M* at App. 22 - 27). The Baltimore City trial judge erroneously overturned

the jury verdict. The jury should be allowed the opportunity to defend their unanimous verdict through appointed counsel by this Court.

Included by reference herein are Petitioner's Petition, Supplemental Briefs, Reply to Brief in Opposition and all Appendices in Mercer v. Thomas, et al., Petition No. 04-1676.

Maryland is making great strides to keep contributory negligence while its citizens suffer.

CONCLUSION

For the reasons stated herein, Petitioner prays this Court to grant his petition for certiorari.

Respectfully submitted,

Gregory Shawn Mercer
Pro Se
Counsel of Record
3114 Borge Street
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(703) - 591-4662

Supreme Court, U.S.
FILED
AUG 30 2005
OFFICE OF THE CLERK

No. 04 - 1676

IN THE
SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER,

Petitioner,

V.

WILLIAM ALOYSIOUS THOMAS, III, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

SUPPLEMENTAL BRIEF WITH APPENDIX VV:

MOTION TO PUT PETITION *"In re* GREGORY SHAWN MERCER, PETITIONER" ON DOCKET

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SUPPLEMENTAL BRIEF

F. Petitioner's letter to the Honorable William K. Suter (*Appendix SS* at App. 179) requesting the clerk-denied Application (*Appendix PP* at App. 168) be sent to Chief and Circuit Justice Rehnquist was denied on August 11, 2005 (*Appendix UU* at App. 190). Petitioner filed a Motion to Put Petition on Docket [*Appendix TT* at App. 189: *In re* Gregory Shawn Mercer, Petitioner] served on August 16, 2005 but filed just after midnight on August 17, 2005 (*Appendix VV* at App. 192). The Motion included docket entries from the COA in Petition Docket Nos. 434 [Mercer v. Thomas] and 490 [Campbell v. BG&E], September Term, 2004 (*Appendix WW* at App. 198). The clerk denied this Motion in the first instance 8/22/05 with the continued rationale that Petitioner was not a party to the Record in Campbell, supra (*Appendix XX* at App. 203).

G. ARGUMENT: It is the Petitioner's responsibility to clearly present the issues in Campbell, supra. The objective of BG&E would be to confuse this presentation of issues to keep a Petition for Common-Law Writ of Certiorari off this Court's docket or get it denied. BG&E can not benefit from this Court granting certiorari to review Campbell, supra. BG&E's past strategy may have been to attack this Court's appellate jurisdiction with a settlement offer to permanently disabled Campbell influencing him to stop cooperating with Petitioner. Any BG&E settlement offer may be invalid due to furtherance of a 7th Amendment violation. After January 21, 2005, Campbell stopped cooperating with Petitioner. Campbell

never filed any Petition in this Court for whatever reason. The effect served BG&E's interests. The objective of the COA seems to have been to continue the Contributory Negligence common-law adopted in Irwin v. Spriggs, 6 Gill 200 (1847). 46 of the other states in the United States have Comparative Negligence laws (*Appendix HH* at App. 114). The strategy of the COA was to render ambiguous the attempts to join COA Petitions for Writ of Certiorari to the COSA (September Term, 2004, Nos. 434 and 490) effectively complicating Petitioner's attempts to file a Petition for Common-Law Writ of Certiorari to the COA in this Court. **This Common-Law Writ may be needed to aid this Court's appellate jurisdiction in accordance with 28 U.S.C. §1651(a) and Supreme Court Rule 20.1.**

H. FACTS: The COA Petition Docket Nos. 434 and 490 requested to be mutually joined in accordance with Maryland Rule 8-401(a) and heard together (**Please read** *Appendix SS* at App. 180 - 184). Mercer's COA Petition No. 434 was filed October 27, 2004 and Campbell's COA Petition No. 490 was filed on December 2, 2004. Petitioner filed a Praecipe in the COA informing the COA Clerk of these mutual Petition requests on December 2, 2004 (*Appendix YY* at App. 205). On December 8, 2004, the COA Clerk sent the COA Judges a Memorandum attached to Petition Docket No. 490 that Petitioner requested COA Petition Docket Nos. 434 and 490 joined and considered at the same time (*Appendix RR* at App. 177). The COA issued simultaneous and identical orders in both cases/appeals first on December 23, 2004 (*Appendices J & V* at App. 18 & 52) and again on March

14, 2005 (*Appendices K & W* at App. 19 & 53). The COA docket entries **indicate simultaneous and identical denial orders** for Petition Docket Nos. 434 and 490 on both these dates without comment on whether the cases/appeals were or were not joined (*Appendix WW* at App. 199 & 202).

While Petitioner expected Campbell to file a Petition for Writ of Certiorari to the COA, Campbell missed his 90-day deadline to file on Monday, June 13, 2005. As this deadline was approaching, Petitioner asked Campbell if he would agree to be a joined party on Petitioner's Petition. Campbell declined while considering filing a Conditional Cross-Petition. While Petitioner expected Respondent Campbell to file a Conditional Cross-Petition within 30 days after June 14, 2005 based on his prior cooperation with Petitioner in the COA, Campbell did not file. *Petitioner was misled by Campbell and this Court's appellate jurisdiction has been hampered in Campbell, supra, as a result.* Petitioner never knew to file an Application for Extension of Time in Campbell, supra, ten days prior to June 12, 2005 because Campbell never informed Petitioner he had abandoned any thought of filing some kind of Petition prior to July 14, 2005. Petitioner filed an Application (*Appendix PP* at App. 168) on the 140th day and *In re* Gregory Shawn Mercer, Petitioner (*Appendix TT* at App. 189) on the 150th day after 3/14/05.

"One who is not a party to a record and judgment is not entitled to appeal therefrom." *In re* Leaf Tobacco Board, 222 U.S. 578 (1911). Petitioner was a party to the same "Judgment" as in Campbell, supra. While the COA has left the question of whether COA Petition Docket Nos. 434 and 490 were joined ambiguous, if a Petition for Writ

of Certiorari to the COA was timely filed in Campbell, supra, this Court would have appellate jurisdiction to review the Campbell COA case/appeal for two reasons in accordance with Supreme Court Rule 10(b & c) (**Please read** *Appendix VV* at App. 195 - 196):

> Rule 10(b): Maryland decided Campbell, supra, in a way which conflicts with a nearly identical West Virginia case, Bradley v. Appalachian Power Company, 163 W. Va. 332, 256 S. E.2d 879 (1979) (See *Appendix KK* at App. 129, 131 - 148).
>
> Rule 10(c): Maryland's common-law of Contributory Negligence was used by the Circuit Court for Baltimore City to reverse a rational and lawful jury verdict thus violating the 7th Amendment to the United States Constitution in Campbell, supra (See *Appendix M* at App. 22 - 29).

Since Respondent Campbell was either influenced or chose not to file a Petition by the 90th day nor filed a Conditional Cross-Petition by the 30th day after becoming a Respondent, *Respondent Campbell has hampered this Court's appellate jurisdiction in Campbell, supra*. Since the COA has left the question of whether Petitioner was a joined party to the "Record" of Campbell, supra, ambiguous, the COA has hampered Petitioner's attempt to file a Petition for Common-Law Writ of Certiorari to the COA in this Court for Campbell, supra, in accordance with Supreme Court Rule 20.1, 20.2, and 28 U.S.C. §1651(a) (See *Appendices MM - YY* at App. 151 - 206). *The COA*

has thereby hampered this Court's appellate jurisdiction. The first of the Questions Presented for Review in this Petition No. 04-1676 is: "Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence." *Petitioner herein argues that the COA left whether Petition Docket Nos. 434 and 490 were joined as ambiguous* ***by design*** *(**See "correction fluid" at App. 200**) to hamper this Court's appellate jurisdiction attempting to prevent Petitioner from filing a Petition for Common-Law Writ of Certiorari.*

I. The Reply to Brief in Opposition to *In re* Gregory Shawn Mercer, Petitioner would include the following case law if that joined Petition had been put on this Court's docket prior to consideration of this Petition, No. 04-1676:

In re Gregory Shawn Mercer, Petitioner attempts to use Petitioner's standing as a joined party in Campbell, supra, to bring that COA case/appeal before this Court by Common-Law Writ of Certiorari and have this Court appoint counsel for the December 1991, Campbell v. BG&E jury. Hunter v. Ohio ex rel. Miller, 396 U.S. 879 (1969) permits the Campbell v. BG&E jury to intervene in a case/appeal coming to this Court from a state court. Should the jury via Court-appointed counsel choose to move to intervene in Campbell, supra, case law exists.

In United States Alkali Export Association, Inc. et al. v. United States, 325 U.S. 196 (1945), a question of whether the District Court or the Federal Trade Commission had jurisdiction in the first instance over a matter at bar was resolved by this Court. The Webb-Pomerene Act did not preclude suit before the Commission

had acted. This appeal came before this Court via a common-law writ of certiorari using §262 of the Judicial Code: "The Supreme Court ... shall have power to issue all writs not specifically provided by statute, which may be necessary for the exercise of [its] respective jurisdiction, and agreeable to the usages and principles of law." Further, "But where, as here, sole appellate jurisdiction lies in this Court, application for a **common law writ in aid of appellate jurisdiction** must be to this Court." This Court's use of a writ in United States Alkali Export Association, supra, was "analogous to those in which this Court has, by writs issued under §262, reviewed the action of district courts, alleged to be in excess of their authority, by ... which they have deprived a party of a trial by jury. *Ex parte Simons*, 247 U.S. 231 [1918]; *Ex parte Peterson*, 253 U.S. 300, 305 [1920]."

In *In re* Simons, Plaintiff's contract for personal attendance and care prior to death of testatrix Mrs. Frank Leslie was to be paid after probate of Leslie's will via bequest from her legacy which would accrue additional interest. Plaintiff's two-count action against the executor of Leslie's will alleged $50,000 in damages. A District Court judge transferred the first count to the equity side of the District Court and removed the count from the original action in error depriving plaintiff of her 7th Amendment right to a trial by jury. Plaintiff's Petition for mandamus, or, if that is denied, for prohibition or certiorari, to the District Court was filed.

This Court regarded the lower court order as having repudiated jurisdiction of the first count ruling "mandamus may be adopted to require the District Court to proceed

and to give the plaintiff her right to a trial at common law."

In *In re* Peterson, Plaintiff filed an action for $21,014.43 for coal deliveries against Defendant who, in turn, alleged Plaintiff's accounting had omissions of other coal deliveries and other payments made. Defendant's counterclaim alleged $9,999.10 against Plaintiff. Upon Defendant's motion, a District Court judge appointed an auditor to simplify the issues for the jury including separating items into disputed or no real dispute categories and setting forth the detailed facts on which the specific claims were rested. This required the auditor to express his opinion on disputed issues such as "[h]is opinion as to the net amount due on each invoice of coal sold and delivered to defendant." A Petition for Writs of Mandamus and/or Prohibition to the District Court was filed in this Court to stop the auditor and judge from proceeding, "to restore the case to the trial calendar, and that the same be tried in the regular and usual way."

This Court considered the objection made by the Respondent to the jurisdiction of this Court:

> But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in Ex parte Simons, 247 U.S. 231, 239, 38 S. Sup. Ct. 497 (62 L. Ed. 1094) 'be dealt with now, before the plaintiff is put to the difficulties and the courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection to our jurisdiction is unfounded.

This Court only took issue with whether the expense of the auditor should be paid by one or both of the parties in accordance with the determination of the trial judge instead of abiding the result of the action. This Court denied any extraordinary writs. It was decided that the 7th Amendment to the United States Constitution "does not require that old forms of practice and procedure be retained. [Case law omitted]. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made."

According to United States Alkali Export Association, supra, where district courts were alleged to be in excess of their authority, §262 of the Judicial Code was used to bring cases before this Court. Where a state court of last resort, the COA, has refused to rectify an instance where a lower state court allegedly used Maryland's Contributory Negligence common law to violate the 7th Amendment to the United States Constitution by erroneously overturning a valid and rational jury verdict in Campbell, supra, review by certiorari via §262 of the Judicial Code is proper. The next case law likens §262 of the Judicial Code to 28 U.S.C. §1651(a).

In Far East Conference et al. v. United States et al., 342 U.S. 570 (1952), a conference of steamship companies was sued by the United States for violations under the Sherman Antitrust Act in District Court prior to initial consideration of the circumstances in controversy by the Federal Maritime Board. The Conference moved for complaint dismissal on the grounds that the nature of the issues required that resort must first be had to the Federal

Maritime Board prior to the District Court. The Board, as intervenor, joined in this motion. The District Court denied the motion. "This Court granted certiorari ... under §262 of the Judicial Code, 28 U. S. C. §1651(a), because there are in issue important questions regarding the relation between the Sherman Law and the Shipping Act."

This Court cited United States Navigation Company v. Cunard Steamship Company, 284 U.S. 474, 485 (1932):

> "The [Shipping] act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect to others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts particular to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. ...
>
> The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are

demonstrative of this conclusion."

This Court concluded that initial submission to the Federal Maritime Board was required and that the District Court case should be dismissed reversing that court's judgment.

According to Far East Conference, supra, §262 of the Judicial Code and 28 U.S.C. §1651(a) were equated and used to resolve important questions regarding the relation between the Sherman Law and the Shipping Act. Campbell, supra, presents important questions a) regarding the relation between the 7th Amendment to the United States Constitution and a common law of Contributory Negligence; and b) where state courts of last resort in Maryland and West Virginia have decided nearly identical cases in conflict, what is "equal justice under law?"

In De Beers Consolidated Mines, Limited et al. v. United States, 325 U.S. 212 (1945), the United States filed a complaint in District Court seeking equitable relief and a preliminary injunction that restrained withdrawal of defendants' assets from the country prior to the determination of the issues in the case. The decree granting the injunction was brought before this Court via §262 of the Judicial Code which this Court reversed since only equitable relief was permitted under the Sherman and Wilson Tariff Acts by the District Court. That court did not have jurisdiction to enter a money judgment yet financial assets were the main concern of the injunction. "But when a court has no judicial power to do what it purports to do - when its action is not mere error but usurpation of power - the situation falls precisely within the allowable use of §262 [of the Judicial Code]."

APPENDIX UU

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

August 11, 2005

Gregory S. Mercer
3114 Borge Street
Oakton, VA 22124

RE: Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company

Dear Mr. Mercer:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case was originally received August 1, 2005 and received again August 10, 2005. The papers are returned for the reasons stated in the August 3, 2005 correspondence. It appears that you were not a party to the case in the Court of Appeals of Maryland (No. 490, September Term, 2004).

Sincerely,
William K. Suter, Clerk
By:

s/ Jeffrey Atkins

Jeffrey Atkins
(202)-479-3263

Enclosures

APPENDIX VV

No. 04-1676

IN THE SUPREME COURT OF THE
UNITED STATES

GREGORY SHAWN MERCER, Petitioner v.

WILLIAM ALOYSIOUS THOMAS, III, et al.,
Respondents

On Petition for Writ of Certiorari
to the Court of Appeals of Maryland

MOTION TO PUT PETITION ON DOCKET

In re GREGORY SHAWN MERCER, PETITIONER

GREGORY SHAWN MERCER, PRO SE
Counsel of Record
3114 Borge Street
Oakton, Virginia 22124
(703)-591-4662

Served: August 16, 2005

Filed & Received: August 17, 2005

COMES NOW Petitioner, Gregory Shawn Mercer, pro se, and moves this Court to put Petition "*In re* Gregory

Shawn Mercer, Petitioner" on the Docket of this Court.

Petition for Common-Law Writ of Certiorari to the Court of Appeals of Maryland, "*In re* Gregory Shawn Mercer, Petitioner," appears as Appendix TT of Petitioner's Supplemental Brief, Petition No. 04-1676, filed August 11, 2005. August 11th is the 150th day since the Petition for Rehearing (Motion for Reconsideration) was denied in Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, Petition Docket No. 490, September Term 2004 (March 14, 2005 - *Appendix W* at App. 53). Campbell missed his 90th day deadline to file a Petition (Monday, June 13, 2005) and his 30-day extension as a Respondent in Petition No. 04-1676 to file a Conditional Cross-Petition (Thursday, July 14, 2005).

Whether Respondent BG&E settled with Respondent Campbell to prevent him from filing any Petition or Respondent Campbell became disillusioned concerning continued legal efforts in this Court and simply gave up, ***this Court's appellate jurisdiction has been hampered by Campbell's failure to file a Petition.*** Petitioner searched for a jury member for an intervenor. As Petitioner searched for the jury, he discovered that neither the Maryland State Archives nor the Circuit Court for Baltimore City has 83% of the original file for Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company, a body corporate, Case No. 87323051 / CL 73959 (*Appendix OO* at App. 161). Missing are all documents in the original file prior to December 20, 1991 including the December 4, 1991 Voir Dire Sheets with prospective jurors names and the December 13, 1991 Jury Verdict

Sheet signed by the Forewoman. However, the trial transcript from December 3, 1991 through December 13, 1991 has been recovered via Respondent Campbell's own records. No intervenor from the jury in accordance with the 7th Amendment to the United States Constitution was found.

Petitioner requested proof from the Court of Appeals of Maryland that September Term 2004 Petitions Nos. 434 and 490 (Gregory Shawn Mercer v. William Aloysious Thomas, III and Campbell, supra) were joined. Maryland's highest court provided Petitioner one inconclusive document (*Appendix RR* at App. 177). Petitioner checked the Court of Appeals of Maryland docket entries for Petitions Nos. 434 and 490 (See *Appendix* [*WW* at App. 198]). However, both Petitions Nos. 434 and 490 received the same judgment on the same day, December 23, 2004 (*Appendices J & V* at App. 18 & 52). Both Petitions for Rehearing (Motions for Reconsideration) in Petitions Nos. 434 and 490 were denied the same day, March 14, 2005 (*Appendices K & W* at App. 19 & 53). Petitioner needs to have been a joined party in Campbell, supra, in the Court of Appeals of Maryland to file a Petition for Common-Law Writ of Certiorari in this Court. The Court of Appeals of Maryland has made Petitioner's standing in Campbell, supra, ambiguous. Petition No. 04-1676 has the first of the Questions Presented for Review: Whether or not Maryland's highest court evaded federal claims in cases/appeals involving contributory negligence. *Petitioner alleges his ambiguous standing in Campbell, supra, in the Court of Appeals of Maryland was by the*

***design** of that court to **hamper this Court's appellate jurisdiction**.*

Supreme Court Rule 10(c) concerning Considerations Governing Review on Certiorari states:

> [A] state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Campbell, supra, presents the important federal question of whether the 7th Amendment to the United States Constitution was violated using Maryland's Contributory Negligence common law as justification making that common law unconstitutional (*Appendix M* at App. 22 - 29). Supreme Court Rule 10(b) states:

> [A] state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort ...

Campbell's Court of Appeals of Maryland Motion for Reconsideration (*Appendix KK* at App. 129, 131 - 148) compares the nearly identical cases, Supreme Court of Appeals of West Virginia's case Bradley v. Appalachian Power Company, 163 W. Va. 332, 256 S.E.2d 879 (1979) and Campbell, supra. West Virginia changed from Contributory Negligence common law to a 49% Comparative Negligence common law based on Bradley,

supra, while Maryland ruled, "denied as there has been no showing that review by certiorari is desirable and in the public interest" in Campbell, supra. *These are two powerful arguments which give this Court jurisdiction in Campbell, supra, a case in which the Court of Appeals of Maryland has already ruled and would prefer this Court not review.*

Petitioner filed an Application for Extension of Time to File a Petition for Common-Law Writ of Certiorari to the Chief and Circuit Justice Rehnquist on August 1, 2005. For **Good Cause**, Petitioner could not have known to file such a document 10 days before June 12, 2005 (the 90th day from the petition for rehearing denial) because Petitioner expected Campbell to file a Petition. Likewise for July 14, 2005 (the 30th day from Respondent Campbell being named a Respondent in Petition No. 04-1676) because Petitioner expected Respondent Campbell to file a Conditional Cross-Petition.

The **extraordinary circumstance** and point of Petitioner's "Supplemental Brief with Appendix TT: *In re* Gregory Shawn Mercer, Petitioner" which was filed August 11, 2005 (The 150th day) was to document Petitioner's efforts to get his Application for Extension of Time past the Clerk's office to the Chief and Circuit Justice Rehnquist and file the Petition for Common-Law Writ of Certiorari. This Petition attempts to bring the Campbell jury via appointed counsel before this Court as a party in order that it might defend its unanimous, December 13, 1991 verdict in accordance to the 7th Amendment. *A common-law writ of certiorari is needed to **aid this Court's appellate jurisdiction** to review*

Campbell, supra, in accordance with 28 U. S. C. § 1651(a). For whatever reason, Campbell, BG&E, a juror intervenor, or jury intervenor either will not or can not file a Petition for Writ of Certiorari. Petitioner is forced to use his standing as a joined party in Campbell, supra, to file this Petition for Common-Law Writ of Certiorari.

WHEREFORE, Petitioner moves this Court to put "*In re* Gregory Shawn Mercer, Petitioner" on this Court's Docket (**Please Note Error**: Petition for common-law writ of certiorari, page iv, Table of Authorities, Cohen v. Rubin is on page "**15**" and not page "**1**").

Respectfully submitted,

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pro se
3114 Borge Street
Oakton, Virginia 22124
(703)-591-4662

APPENDIX WW

COURT OF APPEALS OF MARYLAND

PETITION DOCKET
No. 434, September Term, 2004

GREGORY SHAWN MERCER v.

WILLIAM ALOYSIOUS THOMAS, III

Filed: October 27, 2004
F. F. Pd.

C. C. Prince George's County
Spellbring, J.
CAL0302711

CSA No. 1713, Sept. Term, 2003

Opinion filed: 7/28/04 - Unreported

Mandate issued: 10/12/04

Counsel for Petitioner: Gregory Shawn Mercer
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Rockville, Md. 20850

Copies to the Court: 12-2-04

Result: 12-23-04 - Petition and Supplements denied

2-3-05 - Motion for Reconsideration

3-14-05 - Motion denied

6-14-05 - Motion for Reconsideration

7-18-05 - Motion denied

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

No. 434

October 28, 2004 - Motion to correct errata in petition for writ of certiorari.

November 1, 2004 - Corrected petition for writ of certiorari second motion [to correct errata].

November 4, 2004 - Preaecipe filed.

November 12, 2004 - Answer to petition for writ of certiorari.

November 15, 2004 - Answer to Respondent's petition for writ of certiorari [sic. - Reply to

Respondent's answer to petition for writ of certiorari].

[*Correction fluid*] December 2, 2004 - Praecipe filed.

January 21, 2005 - Motion for reconsideration.
[*End correction fluid*] F. F. Pd.

June 2, 2005 - Motion for clarification, Motion for certification that Federal Questions were raised and decided.
F. F. Pd.

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

COURT OF APPEALS OF MARYLAND

PENDING

PETITION DOCKET
No. 490, September Term, 2004

ROBERT B. CAMPBELL, JR. v.

BALTIMORE GAS AND ELECTRIC COMPANY

Filed: December 2, 2004
F. F. Pd.

C. C. Baltimore City
Smith, J.
87323051

CSA No. 1932, Sept. Term, 2004

Opinion filed: PENDING

Mandate issued:

Petitioner: Robert B. Campbell, Jr.
683 Windsor Drive
Westminster, Md. 21158

Counsel for Respondent: Barbara A. Gaughan, Esq.
750 East Pratt Street
17th Floor
Baltimore, Md. 21202

Copies to the Court: 12-8-04

Result: 12-23-04 - Petition denied

2-3-05 - Motion for Reconsideration

3-14-05 - Motion for Reconsideration denied

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

No. 490

December 8, 2004 - Affidavit of service

December 16, 2004 - Response to petition for writ of certiorari.

December 23, 2004 - Reply to response/answer to petition for writ of certiorari.

January 21, 2005 - Motion for reconsideration. F. F. pd.

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland

By: s/ Joanne T. Drewry Deputy Clerk

APPENDIX XX

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

August 22, 2005

Gregory S. Mercer
3114 Borge Street
Oakton, VA 22124

RE: Gregory Shawn Mercer v. William Aloysious Thomas, III, et al., No: 04-1676

Dear Mr. Mercer:

The motion to put petition on docket in the above-entitled case received August 17, 2005 is herewith returned.

As stated in prior correspondence, only a party to the lower court proceedings may file a petition for a writ of certiorari in this Court. A motion to place such a petition on the docket will not be entertained by the Court.

Your $300.00 check is herewith returned.

Sincerely,
William K. Suter, Clerk
By:

s/ Jeffrey Atkins
Jeffrey Atkins
(202)-479-3263

Enclosures
cc: David F. Grimaldi
Robert B. Campbell, Jr.
Barbara A. Gaughan

APPENDIX YY

IN THE COURT OF APPEALS OF MARYLAND

Petition No. 434, September Term 2004

GREGORY SHAWN MERCER, Petitioner vs.

WILLIAM ALOYSIOUS THOMAS, III, Respondent

PRÆCIPE
(December 2, 2004)

On page 19 of the Petition for Writ of *Certiorari* (Original or Corrected Petition), Petitioner has requested this Court hear Robert B. Campbell, Jr.'s Future Petition together with Petitioner's Petition. On December 2nd, 2004, Campbell's Petition for Writ of *Certiorari* to the Court of Special Appeals of Maryland was filed in this Court. Additionally, on pages 20 and 21 of Campbell's Petition, Petitioner Campbell has requested this Court hear his Petition together with Mercer's (Petitioner herein) Petition. Hopefully the timing is such that these Petitioner requests may be honored by this Court.

Respectfully Submitted,

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pro se
3114 Borge Street
Oakton, Virginia 22124

703-591-4662
202-431-9401

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Præcipe was mailed by first class mail, postage prepaid, to Wade J. Gallagher, Esq., attorney for Respondent, Martell, Donnelly, Grimaldi & Gallagher, 9 North Adams Street, Rockville, Maryland, 20850 this 2nd day of December, 2004.

s/ Gregory Shawn Mercer
Gregory Shawn Mercer, pro se

6

No. 04 - 1676

IN THE

SUPREME COURT OF THE UNITED STATES

GREGORY SHAWN MERCER,

Petitioner,

V.

WILLIAM ALOYSIOUS THOMAS, III, ET AL.,

Respondents.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR REHEARING

GREGORY S. MERCER, PRO SE
Counsel of Record
3114 Borge Street
Oakton, Virginia 22124
(703) 591-4662

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655 A.2d 401 (1995) PFR-7, 8, 9

G & H Clearing & Landscaping v. Whitworth,
66 Md. App. 348, 503 A.2d 1379 (1986) PFR-5

PETITION FOR REHEARING

Pro se Plaintiff, Appellant, Petitioner herein is a citizen of the United States of America by birth who believes in the liberties and justice conveyed by the Constitution of the United States. Petitioner is entitled to enjoy his guaranteed rights recited in the United States Constitution as amended. Specifically, those rights imbedded in the 7th and 14th Amendments. They are the 7th Amendment (right to a civil jury trial) and the 14th Amendment (right to due process and equal protection).

These two Amendments are essential to the nation at large by attempting to ensure fair and unbiased verdicts from juries composed of impartial fact finders considering grievances between adverse parties in the United States. These two Amendments protect as well as guarantee the fair administration of justice in the United States.

Amendment VII to the United States Constitution provides:

> **[Rule 33(1)(d) exclusion of 7 lines]** - In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Circuit Court for Prince George's County, Maryland (hereafter "CC") held a Motions Hearing upon Defendant Thomas' (hereafter Defendant, Appellee, and

Respondent) Motion to Dismiss the Complaint opposed by Plaintiff's Response thereto and dismissed "with prejudice" (decided July 18, 2003) Plaintiff's Original Complaint (filed February 11, 2003) in Gregory Shawn Mercer v. William Aloysious Thomas, III, CAL 03-02711 (*Appendix A* at App. 1 & *Appendix E* at App. 8). Plaintiff's Complaint contained an Election for Trial by Jury. The CC reason for dismissal was two-fold:

> a) "... [F]raud, there's nothing pled regarding reliance on any statement made to the detriment of the plaintiff."
>
> b) "... [T]he matter is filed beyond the 3-year period of limitations ... (*Appendix A* at App.2)"

Before appeal to the Court of Special Appeals of Maryland (hereafter "COSA"), Plaintiff filed a Motion to Alter or Amend a Judgment - Court Decision in the CC pleading all allegedly-fraudulent Defendant deposition and trial testimony verbatim from Complaint Exhibits 4 & 5 (*Appendix AA* at App. 75 & *Appendix BB* at App. 82). This made *correctable* a defect in Plaintiff's Original Complaint, paragraphs 12 & 13. Additionally, Plaintiff's Motion moved for leave to amend the Original Complaint. Complaint Exhibits 4 & 5 were referred to without adoption or verbatim quotation in Complaint paragraphs 12 & 13 (*Appendix X* at App 57).

Further, Plaintiff's Response to Defendant's Motion to Dismiss the Complaint (*Appendix DD* at App. 87) had pled as Plaintiff argued at the CC Motions Hearing

(*Appendix EE* at App. 90 then *Appendix A* at App. 1) that the date Plaintiff discovered Defendant's truthful insurance statement or August 7, 2002 (*Appendix Y* at App. 64) was the date the 3-year statute of limitations commenced for the fraud cause of action in Mercer v. Thomas, CAL 03-02711. A second defect in Plaintiff's Original Complaint, paragraph 19, had been made *correctable* by Plaintiff's Response to Defendant's Motion to Dismiss the Complaint (*Appendix DD* at App. 87). That defect was the date of discovery of Defendant's truthful insurance statement commenced the 3-year statute of limitations not the date of Plaintiff's accident reconstructionist expert's report (*Appendix Z* at App. 68). This was and is in accordance with the Code of Maryland, Courts and Judicial Proceedings, §5-203 which provides:

> **[Rule 33(1)(d) exclusion of 6 lines]** - If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.

Plaintiff had conducted an ordinarily diligent investigation for Defendant's truthful insurance statement (*Appendix AA*, paragraph **H3** at App. 75). Defendant's Answers (signed on May 24, 1995) continuing in nature to Interrogatories propounded to Defendant were as follows:

> 20. State whether you have within your control, or have knowledge of any transcripts of testimony in

any proceeding arising out of the occurrence and, if so, state the date, the subject matter, the name and address of the person recording said testimony.
ANSWER: None.

24. Attach to your Answers a copy of any signed or recorded statements made by this Defendant(s)* in your control, or in the control of your agents, representatives or counsel.
ANSWER: None.

*- Mercer v. Thomas, et al., CAL 94-21066 was a consolidated case which had three Defendants: Defendant Thomas, his mother Defendant Burrell, and Third-Party Defendant Lumsden.

Plaintiff's investigation for Defendant's truthful insurance statement had not been faulty. The Defendant had failed to disclose his statement as required!

The Code of Maryland, Courts and Judicial Proceedings, §5-101 provides:

> [**Rule 33(1)(d) exclusion of 5 lines**] - A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Therefore, for Mercer v. Thomas, CAL 03-02711, "another provision of the Code" in Courts §5-101 above refers to Courts §5-203.

Despite Plaintiff's insistence in CC that his Complaint was *correctable*, the CC denied his Motion to Alter or Amend ***without opining that Plaintiff had made any failure to investigate for Defendant's truthful insurance statement*** (*Appendix A* at App. 1). Denial of the Motion to Alter or Amend was likewise a denial of leave to amend Plaintiff's Complaint. "Leave to amend may, and in some instances should be extended even where pure motion to dismiss is granted." G & H Clearing & Landscaping v. Whitworth, 66 Md. App. 348, 503 A.2d 1379 (1986). **This Petitioner believes this Court may have overlooked that the CC denial of his Motion to Alter or Amend also was a denial of leave to amend a *correctable* Complaint. This was a violation of Petitioner's right as guaranteed by the 7th Amendment to the Constitution since Petitioner's Complaint contains an Election for Trial by Jury.**

On appellate review, the COSA altered the previous CC reason for dismissal of "... nothing pled regarding reliance on any statement made by the defendant ..." All allegedly-fraudulent Appellee deposition and trial testimony had been pled in Appellant's Motion to Alter or Amend filed in the CC. The new COSA reasoning for dismissal was two-fold but different from the CC reasoning:

> c) "[F]or more than three years before he filed this lawsuit, Mercer either knew, or had reason to know, or had reason to investigate whether Thomas's deposition testimony and trial statements differed from his previous statements because he was lying."

> d) "Mercer alleges that he only 'discovered [Thomas's] civil perjury and fraud on January 15, 2003, when Dr. Clyde C. Richard completed his report[.]' ... Our review of Richard's report does not reveal any discernible connection between its findings and Mercer's alleged lack of knowledge regarding the veracity of Thomas's testimony. (*Appendix H* at App. 15)."

Clearly, in the latter of the COSA reasoning, the COSA missed Appellant's Response to Appellee's Motion to Dismiss the Complaint (*Appendix DD* at App. 87) which was properly before the COSA. Case law encourages a CC judge to extend leave to amend a *correctable* Complaint. However, in the COSA there is no opportunity for an Appellant to amend his Complaint based on a new COSA reason.

> "As a result of the Court of Special Appeals *sua sponte* raising the issue of the adequacy of the pleadings, Davis was precluded from either amending his complaint to plead a legally sufficient cause of action **or from having sufficient opportunity to prepare an argument that he did adequately plead a legally sufficient cause of action**. [The portion in **bold** was inadvertently omitted from Petitioner's Petition for Writ of Certiorari, paragraph 2, page 11.] The instant case demonstrates the prejudice that is suffered by a plaintiff when an appellate court affirms a trial court's judgment based on a motion to dismiss for

> failure to state a claim upon which relief can be granted when the motion on appeal is one for summary judgment. Davis v. DiPino et al., 337 Md. 642, 654; 655 A.2d 401, 407 (1995).

The difference between the Davis v. DiPino case and the Mercer v. Thomas case is that the CC in Davis' case didn't take issue with the adequacy of Davis' Complaint so Davis never made an attempt to amend his Complaint while in the CC. Davis' need to amend his Complaint arose in the COSA after Davis was beyond the CC where he could have moved for leave to amend his Complaint. David was prejudiced.

The CC in this Plaintiff's case took issue with the adequacy of his Complaint so Plaintiff moved for leave to amend according to the reasons opined by the CC. When the COSA altered those reasons, this Appellant was prejudiced because he did not "have sufficient opportunity to prepare an argument that he did adequately plead a legally sufficient cause of action" or could amend to do so continuously from the CC and contained in the CC record. Had the CC opined that Plaintiff had failed to investigate for Defendant's truthful insurance statement or the COSA reversed and remanded the case to the CC, Plaintiff would not have been prejudiced.

With an adequate opportunity to prepare an argument, Petitioner argues that the Complaint is still *correctable*. Respondent failed to disclose the truthful insurance statement requested in Interrogatories propounded in the CC for Mercer v. Thomas, et al., CAL 94-21066. Respondent's Answer continuing in nature to

Interrogatory #24 was "None" (See PFR-4 above) as in there are no signed statements by Defendant in Defendant's control or Defendant's insurance company' s control. This was not true but made under oath. Petitioner can not be faulted for failure to investigate further despite Respondent's deposition testimony:

> "**Q** (Petitioner's attorney) - Did you give any person a recorded or written statement in connection with this accident, other than what we're doing today, obviously?
> **A** (Respondent) - I had answered some interrogatories.
> **Q** - Other than those interrogatories, which I'm sure counsel here helped you prepare, and which you answered, did you give a police officer a written statement? Did you speak with any insurance company and give them a written or recoded statement, or anything like that?
> **A** - I know I didn't give the police officer a written statement. And as far as the insurance company, I honestly cannot remember if I did, but I would assume that I did (*Appendix AA* at App. 76)."

Davis v. DiPino concluded with the COA opining the following:

> "Consistent with this Court's decisions, when an appellate court makes a determination that a trial court erred when it granted summary judgment because there was a genuine issue of material fact,

> the court should reverse and remand the case to the trial court for further proceedings. Because the plaintiff is prejudiced when an appellate court *sua sponte* raises and grants a motion to dismiss for failure to state a claim upon which relief can be granted, prohibiting an appellate court from considering that issue is consistent with this Court's refusal to consider an issue for the first time on appeal if to do so would prejudice the plaintiff. ... Thus, the Court of Special Appeals erred in affirming the circuit court's judgment in the instant case based on Davis's failure to plead any claim upon which relief can be granted, when the issue on appeal was whether the circuit court was correct in granting summary judgment for the defendants." Davis v. DiPino et al., 337 Md. 642, 656; 655 A.2d 401, 408 (1995).

This Petitioner believes this Court may have overlooked that the COSA alteration of the CC reason why Petitioner's Complaint was dismissed prejudiced Petitioner by complicating his argument that the Complaint was *correctable*. The COSA affirmation of dismissal on altered grounds was a violation of Plaintiff's right as guaranteed by the 7th Amendment to the Constitution since Plaintiff's Complaint is *correctable* and contains an Election for Trial by Jury.

Amendment XIV to the United States Constitution, section 1 provides, in pertinent part:

> **[Rule 33(1)(d) exclusion of 10 lines]** - All persons

> born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

When the CC dismissed Plaintiff's Complaint and the COSA affirmed this dismissal of Appellant's Complaint, Petitioner was precluded from defending against Respondent's Contributory Negligence allegation with his available Last Clear Chance defense. A Last Clear Chance defense was used successfully to defend against a Contributory Negligence allegation in Cohen v. Rubin, 55 Md. App. 83, 460 A.2d 1046 (1983). **This Petitioner believes this Court may have overlooked that the CC dismissal of Petitioner's Complaint and the COSA affirmation of that dismissal precluded Petitioner's argument of an available Last Clear Chance defense to a Contributory Negligence allegation similar to the legal theory argued in Cohen v. Rubin successfully. This was a violation of Plaintiff's right as guaranteed by the 14th Amendment to the Constitution since Petitioner has the right of equal protection of the laws.**

Petitioner attempted to put on this Court's Docket a Petition for Common Law Writ of Certiorari to the Court of Appeals of Maryland (hereafter "COA") for Robert B. Campbell, Jr. v. Baltimore Gas and Electric Company,

Petition Docket No. 490, September Term, 2004 (*Appendices MM, PP, SS, TT, & VV* at App. 151, 168, 179, 189, & 192, respectively). See case law concerning Common Law Writs of Certiorari at SB-13 to SB-18. Plaintiff's attempts were all denied by this Court's Clerk in the first instance because the Mercer and Campbell Petitions were not joined in the COA (*Appendices NN, QQ, UU, XX* at App. 159, 175, 190, 203, respectively). However, Petitioner had filed a COA Praecipe (*Appendix YY* at App. 205) and the COA Clerk had circulated a Memorandum among the COA Judges concerning joining these two Petitions and attached to Campbell's COA Petition (*Appendix RR* at App. 177). ***Some COA Docket Entry was made in Mercer v. Thomas and then deleted with correction fluid*** (*Appendix WW* at App. 200). **This Petitioner believes this Court may have overlooked that the COA may have hindered this Court's appellate jurisdiction in Campbell v. BG&E by deleting a docket entry in Mercer v. Thomas. The entry may have stated that these two COA Petitions were joined in the COA. See *Appendix ZZ* at App. 207 attached hereto.**

CONCLUSION

For the reasons stated herein, Petitioner prays this Court grant his petition for rehearing and issue a writ of certiorari to the COA for Mercer v. Thomas. **[Rule 33(1)(d) exclusion of 28 lines (See PFR-1, 3, 4, & 9)]**.

CERTIFICATE OF PETITIONER

This Petition for Rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. This Petition for Rehearing is made in good faith. This Petition for Rehearing is not for delay.

Gregory Shawn Mercer, pro se
Counsel of Record

APPENDIX ZZ

The following are certified copies of the actual Court of Appeals of Maryland Docket Entries in Gregory Shawn Mercer v. William Aloysious Thomas, III, Petition Docket No. 434, September Term, 2004. Please note the correction fluid under the docket entry for December 2, 2004. Also note that the docket entry for the December 8, 2004 Memorandum Concerning the Joining of Court of Appeals of Maryland Mercer and Campbell Petitions (*Appendix RR* at App. 177) is missing. Had the Mercer and Campbell Petitions been joined by the Court of Appeals, the *In re* Gregory Shawn Mercer, Petitioner (*Appendix TT* at App. 189) Common Law Petition for Certiorari would not have been denied by the Supreme Court Clerk in the first instance. *Did the Court of Appeals of Maryland hinder this Court's appellate jurisdiction by deletion of a docket entry?*

PETITION DOCKET

No. 434, September Term, 20 04

GREGORY SHAWN MERCER

v.

WILLIAM ALOYSIOUS THOMAS, III

Filed: October 27, 2004
F.F. Pd.
(C.C. Prince George's County
Spellbring, J.
#CAL0302711

A True copy:
Test: Alexander L. Cummings, Clerk
Court of Appeals of Maryland
By: Joann A. Davis Deputy Clerk

CSA No. 1713, Sept. Term, 20 03

Opinion filed: 7/28/04 - Unreported

Mandate issued: 10/12/04

Counsel for Petitioner:
Gregory Shawn Mercer
3114 Borge Street
Oakton, Va. 22124

Counsel for Respondent:
Wade J. Gallagher, Esq.
Martell, Donnelly, Grimaldi & Gallagher
9 North Adams Street
Rockville, Md. 20850

Copies to the Court: 12.1.04 6.14.05 - Motion for Recon 2.3.05 - Motion for Reconsideration 3.14.05 - Motion denied 7.18.05 - motion denied

Result: 12.22.04 - Petition & Supplement denied

No. 434

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June 2, 2005 - Motion for clarification, Motion for certification that Federal Questio were raised and decided.
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Court of Appeals of Maryland
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